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# FEDERAL DECISIONS.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO  
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-  
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-  
GENERAL, AND THE OPINIONS OF GENERAL  
IMPORTANCE OF THE TERRI-  
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;  
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri  
and Tennessee, a Digest of the Texas Reports, and  
local works on Pleading and Practice.*

VOL. VI.

CONSTITUTION AND LAWS.

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## EXPLANATORY.

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1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, DOE v. ROE.\* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.





## CERTIFICATE OF APPROVAL.

I have examined the subject of Constitution and Laws as published in volumes six and seven of Myer's Federal Decisions and certify that the Star[\*] cases,† of which only a digest is published, were properly rejected as unnecessary to be printed in full because the questions therein decided are fully discussed in leading cases which are printed at length, therefore more than a digest would add nothing of value to the subject.

WILLIAM G. HAMMOND.\*

---

\* Dean of the St. Louis Law School and lecturer in the Boston University Law School; formerly Professor of Law in the Iowa State University and member of the Commission of 1873 to revise the laws of Iowa; author of a Digest of Iowa Reports and editor of Lieber's Hermeneutics.

† Cases originally assigned to this topic to be therein printed at length, if so printed anywhere in the series, but afterwards reduced to a digest as not of sufficient value to warrant anything more because they come under the following rule announced as part of our plan, viz:

"All important cases will be published in full, but cases which merely affirm or follow some leading case, or those which are based upon a particular state of facts and do not announce any important principle of law, and in some instances those which turn upon a well settled principle of law, will not be published in full, but only digested, the extract to be sufficiently full for all practical purposes. Where a series of cases, all covering the same ground and addressed to the same subject matter, are reviewed and affirmed in a later case, usually the last case will be given in full, and the others will be digested. Whenever there is a well grounded doubt whether a digest of a case will be sufficient, the case will be given in full. It is not intended, however, to publish in full the opinions of the Court of Claims, nor those found in the State reports and law periodicals, except such as are of more than ordinary value."



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Abbott's U. S. ....	Abb.	McAllister.....	McAl.
Albany Law Journal .....	Alb. L. J.	McCahon.....	McCahon.
American Law Register...	Am. L. Reg.	McCrary .....	McC.
Baldwin .....	Bald.	McLean .....	McL.
Bee .....	Bee.	MacArthur .....	MacArth.
Benedict .....	Ben.	Marshall .....	Marsh.
Bissell .....	Biss.	Martin.....	Martin (N. C.).
Black.....	Black.	Mason .....	Mason.
Blatchford.....	Blatch.	Montana Territory .....	Mont. T'y.
Blatchford's Prize Cases...	Bl. Pr. Cas.	Newberry.....	Newb.
Blatchford & Howland....	Bl. & How.	National Bankruptcy Regis-	
Bond .....	Bond.	ter .....	N. B. R.
Brewster .....	Brewster.	Olcott .....	Olc.
Brockenbrough .....	Marsh.	Opinions of Attorneys-Gen-	
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Call .....	Call (Va.).	Oregon .....	Oreg.
Central Law Journal.....	Cent. L. J.	Otto .....	Otto.
Chase's Decisions .....	Chase's Dec.	Overton .....	Overton (Tenn.).
Chicago Legal News .....	Ch. Leg. N.	Paine.....	Paine.
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Curtis .....	Curt.	Story .....	Story.
Dakota Territory.....	Dak. T'y.	Sumner.....	Sumn.
Dallas .....	Dal.	Taney .....	Taney.
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Deady .....	Deady.	Wallace .....	Wall.
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Federal Reporter.....	Fed. R.	Wallace, Jr.....	Wall. Jr.
Fisher's Patent Cases.....	Fish. Pat. Cas.	Ware .....	Ware.
Flippin .....	Flip.	Washington.....	Wash.
Gallison .....	Gall.	Washington Territory.....	Wash. T'y.
Gilpin .....	Gilp.	Wheaton .....	Wheat.
Hempstead .....	Hemp.	Wheeler's Criminal Cases ..	Wheeler.
Hoffman.....	Hoff.	Woods.....	Woods.
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Howard .....	How.	Woolworth .....	Woolw.
Hughes.....	Hughes.	Wyoming Territory .....	Wyom. T'y.
Law and Equity Reporter..	Law & Eq. Rep.	Van Ness .....	Van Ness.
Legal Gazette Reports .....	Leg. Gaz. R.		

# FEDERAL DECISIONS.

## CONSTITUTION AND LAWS.\*

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- XV. FOREIGN LAWS, §§ 3112-3135.
- XVI. ORDINANCE OF 1787, §§ 3136-3172.
- XVII. LAW OF NATIONS, §§ 3173-3232.

## I. GENERAL PRINCIPLES.

§ 1. *Constitution became operative, when.*—The constitution did not become operative until it was ratified by nine states, and the day appointed by congress, in accordance with the resolution of the convention, "for commencing proceedings under the constitution,"

\* Edited by ELISHA GREENHOOD, Esq., of the St. Louis Bar, and Editor of the CENTRAL LAW JOURNAL. The digest matter from all cases other than those originally assigned in full to this subject was prepared by CHARLES N. BROWN and THEODORIC B. WALLACE, Esqs., of Madison, Wisconsin.

which day was the first Wednesday in March, 1789, and an act passed before that day by a state cannot be said to be a law impairing the obligation of a contract. *Owings v. Speed*,\* 5 Wheat., 420.

§ 2. Powers of the federal government.—The departments.—The federal government is one of limited and specific powers. It cannot exercise jurisdiction by implication, but is confined to the special grants of powers in the constitution, and in carrying into effect these grants the most appropriate means should be adopted, and no means beyond what are necessary to give effect to the power can legitimately be used. *United States v. Ciska*, 1 McL., 257. See GOVERNMENT.

§ 3. Congress is supreme in matters of legislation, and the accounting officers of a department cannot superadd a condition not required by an act of congress. *Magruder v. United States*,\* Dev., 21.

§ 4. The constitution of the United States confides to congress the exclusive power of disposing of and making all needful rules and regulations respecting the public property of the government, and no officer of the government can exercise the granting power over the public property of the United States. *Seabury v. Field*, 1 McAl., 3.

§ 5. It seems that a law giving to the secretary of war exclusive jurisdiction to discharge from service a minor under eighteen, who had enlisted in the service of the United States without the consent of his parent or guardian, would be unconstitutional. *Seavey v. Seymour*, 8 Cliff., 453.

§ 6. The theory of the constitution undoubtedly is, that the great powers of the government are divided into separate departments, and, so far as these powers are derived from the constitution, the departments may be regarded as independent of each other. But beyond that all are subject to regulation by laws touching the discharge of duties to be performed. So *mandamus* will lie to enforce a ministerial act imposed by congress on the postmaster-general. *Kendall v. United States*, 12 Pet., 610.

§ 7. Treasury agents of the United States, directed by act of congress to ascertain and collect debts due from public officers, and who are appointed by the president and hold office at his pleasure, can have and exercise no judicial functions. (Per MARSHALL, C. J.) *Ex parte Randolph*, 2 Marsh., 481.

§ 8. The proviso in the act of July 12, 1870, which declares, in substance, that no pardon acceptance, oath, or other act performed in pursuance, or as a condition, of pardon, shall be admissible in evidence in support of any claim against the United States in the court of claims, or to establish the right of any claimant to bring his suit in that court; and which requires proof of loyalty to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty, or act of oblivion, and when any judgment has been already rendered on other proof of loyalty, the supreme court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction; and providing further, that whenever any pardon, granted to any suitor in the court of claims, for the proceeds of captured and abandoned property, shall recite in substance that the person pardoned took part in the late rebellion, or was guilty of any act of disloyalty, and shall have been accepted in writing, without express disclaimer and protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive evidence in the court of claims, and on appeal, that the claimant did give aid to the rebellion; and, on proof of such pardon or acceptance, the jurisdiction of the court shall cease, and the suit shall be forthwith dismissed, is held to be invalid, as prescribing rules of decision for the judicial department, and as impairing the authority of the executive. (MILLER and BRADLEY, JJ., dissent.) *United States v. Klein*, 13 Wall., 128.

§ 9. Rules for construing the constitution.—The constitution deals in generalities and not in details, and as its framers could not perceive beforehand the distinctions which might arise in the course of national existence, it is confined to broad and general principles. *Bank of United States v. Deveaux*, 5 Cr., 87.

§ 10. The safest rule of interpretation of the constitution, in investigating the nature and extent of congressional powers, is to look at the nature and objects of the particular power, duty or right under consideration, with all the lights and aids of contemporary history, and to give the words of each, just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed. This rule of construction is the same for the constitution as for statutes, wills and contracts. This purpose having been ascertained, the language must be construed in reference to that purpose so as to subserve it. *Legal Tender Cases*, 12 Wall., 457; *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 610.

§ 11. When the binding force of a state law is drawn in question for its supposed repugnancy to the federal constitution, if, by a fair and reasonable interpretation, where the case is at all doubtful, the law can be reconciled with the constitution, it ought to be done; and a contrary course pursued only where the incompatibility is so great as to render it extremely



difficult to give the former effect, without violating some provision of the latter. *Adams v. Storey*, 1 Paine, 79.

§ 12. It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore a construction which would have this effect is inadmissible unless the words require it. *Marbury v. Madison*, 1 Cr., 174.

§ 13. A constitution contains the permanent will of the people. It is the supreme law of the land. It is paramount to the power of the legislature, and can be revoked or altered only by the power which created it. Legislatures are creatures of the constitution. They owe their existence to it and derive their powers from it, and their acts must conform to it or they will be held void. The constitution fixes the limit of legislative authority, and every act of a legislature in conflict with it is absolutely void. *Vanhorne v. Dorrance*, 2 Dal., 308.

§ 14. The solution of a question of construction of the constitution depends on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states, together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which the supreme court has always resorted in construing the constitution. *State of Rhode Island v. State of Massachusetts*, 13 Pet., 721; *Falconer v. Campbell*, 2 McL., 201.

§ 15. — **whole instrument to be considered.**—In construing any particular clause of the constitution the whole instrument should first be considered. *United States v. Morris*, 1 Curt., 50.

§ 16. — **object to be considered.**—A constitutional provision should not be so construed as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischiefs it was aimed at. So where a state constitution prohibits municipalities from loaning their credit to corporations, such prohibition will be held to cover an indirect as well as a direct loan of such credit. *Jarrolt v. Moberly*, 18 Otto, 535.

§ 17. — **contemporaneous construction.**—Though the question of the constitutionality of a law may be doubtful, yet a contemporaneous construction, and long acquiescence therein, and an extensive and uniform recognition of its validity, must be considered to set the matter at rest. *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 621.

§ 18. — **principles of natural justice.**—A law which is not in conflict with the constitution of the United States, or with that of the state enacting it, cannot be pronounced void by the courts, although its provisions are not in harmony with the principles of natural justice. The matter, in such a case, rests wholly with the legislature, which is wholly responsible to the people and is not under judicial control. *Albee v. May*, 2 Paine, 81.

§ 19. — **meaning of words.**—The fact that the constitution of a state uses a particular word, *e. g.*, "privileges," in one clause in a particular sense, is no evidence that this use was intended to be a constitutional definition, especially when used in the same sense in other places in the constitution, and is no evidence that it was used in the same sense in acts of the legislature subsequently passed. But in each instance the sense in which the word is used must be determined from the act in which it occurs. *Louisville & Nashville R'y Co. v. Gaines*, 2 Flip., 633.

§ 20. — **retrospective operation.**—The rule that an enactment is not to be presumed to be intended to operate retrospectively, applies to constitutions as well as to statutes. *Starr v. Hamilton*, Deady, 276.

§ 21. Retrospective action of amendments to the constitution, and results which flow naturally from them, are not to be avoided by considerations of inconvenience and hardship. *Buckner v. Street*, 1 Dill., 257.

§ 22. — **meaning of terms to be considered.**—The constitution of the United States, in its grant of equity powers to the federal courts, is to be construed according to the meaning of the terms used at the time they were used, and the powers given cannot be enlarged by giving to such terms a meaning which they may have had at a time long previous, but which they had not at that time. (Per *TANEY*, C. J.) *Fontain v. Ravenel*, 17 How., 394.

§ 23. — **historical and contemporaneous constructions.**—In construing any article of doubtful import in the constitution, no better rule can be adopted than to recur to the situation and history of the country at the time, to its contemporaneous exposition, if it has received any, and to the general understanding of the community, if such understanding has been long acquiesced in by all the states and all the courts of the Union. *Adams v. Storey*, 1 Paine, 90.

§ 24. The early and long-continued construction of the constitution, by both national and state legislatures, is entitled to the gravest consideration in deciding on an alleged repugnancy of a state statute to the federal constitution. *Ex parte McNiel*, 13 Wall., 236.

§ 25. — **most reasonable to be adopted.**—No court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends, when another construc-

tion, equally accordant with the words and sense thereof, will enforce and protect them. *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 612.

§ 26. — **majority of court.**— The supreme court will not render an opinion upon the constitutionality of a law unless four judges concur. *Briscoe v. Commonwealth's Bank of State of Kentucky*, 8 Pet., 118.

§ 27. — **negative implied.**— In construing the constitution, the court may imply a negative from affirmative words where the implication promotes, not where it defeats, the intention. *Cohens v. Virginia*, 6 Wheat., 264.

§ 28. **Construing state constitutions.**— The rule of construction of state constitutions is that they are not special grants of power to legislative bodies, like the constitution of the United States, but general grants of all the usually recognized powers of legislation not actually prohibited or expressly excepted. The exception must be construed strictly as against those who stand upon it, and liberally in favor of the government. *Southern Pac. R. Co. v. Orton*, 6 Saw., 157.

§ 29. **On the constitutionality of laws.**— Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it be clearly so. *Munn v. Illinois*, 4 Otto, 118 (§§ 1849-67).

§ 30. The courts will declare a law unconstitutional only when circumstances render that duty imperative. *Trade Mark Cases*, 10 Otto, 96; *Ex parte Randolph*, 2 Marsh., 471.

§ 31. A law will not be held unconstitutional unless its incompatibility with the constitution be clear. *Fletcher v. Peck*, 6 Cr., 87 (§§ 1805-12); *County of Livingston v. Darlington*,\* 11 Otto, 407.

§ 32. The motives of the legislature in passing a law will not be inquired into in a contest between individuals. *Fletcher v. Peck*, 6 Cr., 87 (§§ 1805-12).

§ 33. A court cannot declare a statute invalid unless it is prohibited by some express provision of the constitution or by necessary implication. Its repugnance to justice, to what the court deems sound policy, or to general principles of jurisprudence, furnishes no ground for refusal to enforce it. *Talcott v. Township of Pine Grove*,\* 1 Flip., 120.

§ 34. It is a principle in constitutional law that departmental and legislative action will conclude the courts in all cases where any possible interpretation can uphold actual investments and contracts. *Ibid.*

§ 35. It is inadmissible to institute a judicial inquiry into the motives or intention of legislators in the enactment of a statute, and make the validity of the enactment depend upon the result of such an examination. *Kountze v. City of Omaha*, 5 Dill., 443.

§ 36. The authority of the judiciary to annul laws deliberately and solemnly passed, in the form prescribed by the constitution, is one of great delicacy, and should always be exercised with great caution and deliberation. *Darby v. Wright*,\* 3 Blatch., 170.

§ 37. In whatever language a statute may be framed, its purpose may be determined by its natural and reasonable object; and if it is apparent that the object of the statute, as judged by that criterion, is to override some constitutional prohibition, it will be declared invalid, regardless of its assumed object. *In re Parrott*, 1 Fed. R., 481 (§§ 982-1007).

§ 38. Where the decision in a case depends on the alleged inconsistency of a legislative provision with the fundamental law, it is the duty of the court to compare the act with the constitution, and if the former cannot, upon a fair construction, be reconciled with the latter, to give effect to the constitution and not the statute. *Hepburn v. Griswold*, 8 Wall., 603.

§ 39. Where an act of the legislature is susceptible of two constructions, one of which will overthrow the act or make it unconstitutional, and the other will support the act and give it effect, the latter is to be adopted by the judicial branch of the government. This principle commends itself with great force to the federal courts when they are called upon to expound and apply state legislation, especially in cases where the revenue law of a state is in question. *St. Louis National Bank v. Papin*, 4 Dill., 32.

§ 40. An act of the legislature contrary to the constitution is not the law, and is void. *Marbury v. Madison*, 1 Cr., 177.

§ 41. Acts which are prohibited by law can impose no obligations on any one, nor will the law notice any controversy between persons who have united in violation of the law. *Nessmith v. Sheldon*, 4 McL., 377.

§ 42. Where there is a plain and obvious conflict between the constitution and an act of congress, there is no room for construction, no ground for argument, and in all such cases not only the judiciary department, but every department, and, indeed, every individual who is required to act upon the subject-matter, must determine for himself what the law of the land really is, as applicable to the case in hand. The conflict, in such a case, is between the higher and the lower law, and the lower law must succumb, and the constitution must be obeyed, though the statute may be broken. But if the conflict is doubtful, it is better for the persons affected to obey the law and leave persons interested to their resort to the courts.

Rights of Settlers,\* 10 Op. Att'y Gen'l, 61; State Lottery Co. v. Fitzpatrick,\* 3 Woods, 222.

§ 43. An unconstitutional law affords no justification to an officer for an act injurious to an individual. *Astrom v. Hammond*, 3 McL., 110; *Osborn v. Bank of United States*, 9 Wheat., 738 (§§ 2368-87).

§ 44. A void law can afford no protection to any one who acts under it. Although he may proceed under color of a law upon the statute books, yet the law, being unconstitutional, can afford no protection. *Woolsey v. Dodge*, 6 McL., 146.

§ 45. In case of an application for injunction or *mandamus* against a public officer, if he pleads the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void. *Board of Liquidation v. McComb*, 2 Otto, 541.

§ 46. The question whether a certain pretended act is a law or not is a judicial question, to be settled and determined by the courts and judges, and there can be no such thing as a person being estopped to deny the invalidity of any such act. *Town of South Ottawa v. Perkins*, 4 Otto, 267.

§ 47. Where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect. *Daniels v. Tearney*, 12 Otto, 421.

§ 48. The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law. If, in a case depending before any court, a legislative act shall conflict with the constitution, a court must exercise its judgment upon both, and the constitution must control the act. The court must determine whether a repugnancy does or does not exist; and in making this determination must construe both instruments. *Bank of Hamilton v. Dudley*, 2 Pet., 524; *Walnut v. Wade*, 13 Otto, 633; *United States v. Riley*, 5 Blatch., 207.

§ 49. When the binding force of an act of the legislature of any state is drawn in question for its supposed repugnancy to the federal constitution, although no court can entertain any doubt of its right to pronounce it invalid, yet it is no more than becoming to proceed with caution, and with more than ordinary deliberation. Presumptions will ever exist in favor of the law, for it will not readily be supposed that any state legislature, which is as much bound by the constitution, and is under the same solemn sanctions as the courts to regard it, have either mistaken its meaning, or knowingly transcended their own powers. If, then, by any fair and reasonable interpretation, where the case is at all doubtful, the law can be reconciled with the constitution, it ought to be done, and a contrary course pursued only where the incompatibility is so great as to render it extremely difficult to give effect to the former without violating some provision of the latter. *Adams v. Storey*, 1 Paine, 80; *Peres v. City of Watertown*, 6 Biss., 79; *United States v. Rhodes*, 1 Abb., 52; *Lothrop v. Stedman*, 13 Blatch., 134; *In re Solomon*, 2 Hughes, 164; *Falconer v. Campbell*, 2 McL., 201; *Harris v. Steamboat Henrietta, Newb.*, 284; *Legal Tender Cases*, 13 Wall., 457; *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70); *County of Livingston v. Darlington*,\* 11 Otto, 407; *Munn v. Illinois*, 4 Otto, 113 (§§ 1349-67); *Luling v. City of Racine*, 1 Biss., 317; *Baltimore & Ohio R'y Co. v. Van Ness*, 4 Cr. C. C., 600; *Ware v. Hylton*, 3 Dal., 223; *Township of Pine Grove v. Talcott*, 19 Wall., 666; *Campbell v. United States*,\* 10 Law Rep., 401.

§ 50. In a case which requires the ascertainment of a fact upon which the authority of a legislature to do an act is to depend, the fact that the legislature has exercised such authority carries with it the presumption that the fact had been ascertained, and that the legislature acted within the scope of its authority. So where the constitution of a state provided that no city should be incorporated unless it contained five thousand inhabitants, and a city was incorporated, it was held that the validity of the act of incorporation could not be inquired into collaterally on the ground that the city had less than the required number of inhabitants. *Judson v. City of Plattsburg*, 3 Dill., 183.

§ 51. The decision of the supreme court of the United States, that a law is constitutional, is binding upon juries as well as upon courts. *United States v. Shive, Bald.*, 511.

§ 52. Where an act has been before the supreme court several times, and its constitutionality has not been questioned, it seems that the inferior federal courts are bound to presume it valid unless satisfied that that point passed without observation in the court above. *Sample v. United States*, Chase's Dec., 261.

§ 53. All constitutional laws of congress are binding on the people of all the states, whether they consent to be bound thereby or not. Every such act is passed by the will of the people of the United States, expressed through their representatives, on the subject-matter of the enactment, and when passed, becomes the supreme law of the land, and operates by its own

force on the subject-matter, in whatever state or territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject-matter of its enactment without the express consent of the people of the state where it may happen to be, contains its own refutation. *Pollard v. Hagan*, 3 How., 224.

§ 54. The courts of the United States cannot hold a law unconstitutional upon the ground that it violates treaty obligations. Such a question is an international one, to be settled between the foreign nations interested therein and the political department of the government. *Gray v. Clinton Bridge*,\* 7 Am. L. Reg. (N. S.), 151.

§ 55. Where a state statute is invalid, a proviso therein cannot be relied on as a contract, the impairment of which is forbidden by the constitution. *People v. Commissioners of Taxes*, 4 Otto, 417.

§ 56. Provision directory, when.—That provision of the constitution of Mississippi, that "the introduction of slaves into this state as merchandise, or for sale, shall be prohibited from and after the 1st day of May, 1833," was merely directory on the legislature, and is not a prohibition *per se*. *Groves v. Slaughter*, 15 Pet., 499.

§ 57. Legislature cannot bind successor.—A legislative act does not bind a subsequent legislature. Each successive legislature possesses the same power and may exercise the same discretion. There is no mode by which a legislative act can be made irrevocable except it assume the form and substance of a contract. *Bloomer v. Stolley*, 5 McL., 161.

§ 58. Legislation required to enforce constitution.—When the provision of a constitution points to something more to be done, and looks to some future time for the accomplishment of what is required, the general rule is that it contemplates legislation to carry it into effect. So a provision of a constitution, which provides that "dues from corporations shall be secured by individual liability of the stockholders" to an amount equal to their stock, looks to future legislation to carry it into effect. *Morley v. Thayer*, 3 Fed. R., 739.

§ 59. Implied power of the legislature.—Where a constitution declares that "the legislature shall provide for the incorporation and organization of cities and villages, and shall restrict their powers of taxation, borrowing money, contracting debts and loaning their credit," it implies that the powers to be restricted may be exercised, and is sufficient authority for the legislature to empower cities, townships and villages to issue their bonds, as a loan or donation, in aid of the construction of any railroad. *Township of Pine Grove v. Talcott*, 19 Wall., 666.

§ 60. If power is granted by the legislature to do an act, and the power is not limited by express words, an inferential limitation cannot be sustained which would defeat the object of the law. *Cook v. Commissioners of Hamilton County*, 6 McL., 119.

§ 61. Acts void in part.—An act may be void in part and good in part. *Milne v. Huber*,\* 3 McL., 212.

§ 62. Statutes which are constitutional in part only will be upheld so far as they are not in conflict with the constitution, provided the allowed and the prohibited parts are severable. *Penniman's Case*,\* 13 Otto, 714. An invalid provision of a law will not affect another and distinct provision which is valid. *Duer v. Small*,\* 17 How. Pr., 205.

§ 63. The same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. But if they are so mutually connected with, and dependent on, each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them. The point to be determined in all such cases is whether the constitutional provisions are so connected with the general scope of the law as to make it impossible, if they were stricken out, to give effect to what appears to have been the intention of the legislature. *Allen v. Louisiana*, 13 Otto, 83; *Railroad Co. v. Schutte*, 13 Otto, 118; *Penniman's Case*,\* 13 Otto, 714; *Milne v. Huber*,\* 3 McL., 212; *Ex parte Touchman*, 1 Hughes, 602; *Duer v. Small*,\* 17 How. Pr., 205; *S. C. v. 4 Blatch.*, 268; *Packet Co. v. Keokuk*, 5 Otto, 80 (§§ 1420-23); *Briscoe v. Bank of Commonwealth of Kentucky*, 11 Pet., 257 (§§ 539-559); *Tilley v. Savannah, etc., R. Co.*, 5 Fed. R., 641 (§§ 2148-57).

§ 64. Amendments.—The first ten amendments to the constitution are restrictions on the federal government. *Withers v. Buckley*, 20 How., 84 (§§ 207-209); *Walker v. Sauvinet*, 2 Otto, 90 (§§ 690-692); *Pervear v. The Commonwealth*, 5 Wall., 475; *Barron v. Mayor of Baltimore*, 7 Pet., 247; *United States v. Crosby*, 1 Hughes, 456; *Griffing v. Gibb*, McAl., 220; *Edwards v. Elliott*, 21 Wall., 532; *Pearson v. Yewdall*, 5 Otto, 296; *Twitchell v. The Commonwealth*, 7 Wall., 321; *Clark v. Dick*, 1 Dill., 8.

§ 65. An amendment to a constitution is a fundamental and paramount law, and its operation and effect cannot be limited or controlled by previous laws or constitutions in conflict

with it, or any previous policy of the government. *Buckner v. Street*, 1 Dill., 257; *Territory of Kansas v. Reyburn*, McCahon, 141.

§ 66. In determining the constitutionality of an act of congress, the fact that the law was passed immediately after the adoption of an amendment to the constitution, and in the supposed exercise of the powers conferred by the amendment, and by a congress composed largely of the men who framed the amendment, is entitled to great weight as a legislative construction and interpretation of the provisions of the law. *United States v. Jackson*, 8 Saw., 59.

§ 67. The right of freedom of speech, and the right peaceably to assemble, and other rights enumerated in the first eight amendments to the constitution, are thereby protected only against the legislation of congress, and not against the legislation of the states. These rights, therefore, were not secured to the people of the United States until the fourteenth amendment to the constitution, because till then they might be impaired by state legislation; but now they are not only secured from congressional interference, but, by the amendment, from state interference also. *United States v. Hall*, \* 13 Int. Rev. Rec., 182.

§ 68. **Taking private property.**—A statute repealing the charter of an incorporated street railway company, and providing that another company should operate its roads along the same streets, and that the latter should take the tracks of the former, subject to the law relating to the taking of land by railway companies, and the compensation therefor, is valid. *Greenwood v. Freight Co.*, 15 Otto, 22.

§ 69. A state statute which authorizes the taking of the fee to land for a boom, on the making of just compensation, by a boom company incorporated by the legislature, and under its control, is constitutional. *Patterson v. Mississippi, etc., Boom Co.*, 3 Dill., 466.

§ 70. Regulation of railroad rates is not a taking of private property for public use. *Tilley v. Savannah, etc., R. Co.*, 5 Fed. R., 641 (§§ 2143-57).

§ 71. An act providing for the dredging of an entire harbor or bay, and the payment of the expense thereof by the one county lying next the harbor, is not an unconstitutional assumption of legislative power, nor is it a taking of private property for public use without compensation. Taxation can never be called an exercise of the right of eminent domain; it is a means of obtaining the necessary funds for the conduct of the operations of the government. *County of Mobile v. Kimball*, 12 Otto, 691 (§§ 1177-82).

§ 72. **Legalizing void laws.**—A statute may legalize acts done under authority of an unconstitutional law, and this may be done by implication. *Campbell v. City of Kenosha*, 5 Wall., 194; *Commercial National Bank of Cleveland v. City of Iola*, 2 Dill., 355.

§ 73. A legislature cannot give validity to a law not constitutionally passed, by referring to it in a subsequent statute as a valid and subsisting law. *Town of South Ottawa v. Perkins*, 4 Otto, 270.

§ 74. **Vested rights.**—A law reviving a claim already barred by the statute of limitations, is unconstitutional as destroying vested rights. *Lockhart v. Horn*, 1 Woods, 628.

§ 75. A state legislature cannot divest an eleemosynary corporation, such as a seminary of learning, or any one else, of its title to lands lawfully acquired. *Board of Trustees of Vincennes University v. State of Indiana*, 14 How., 277; *Vanhorne v. Dorrance*, 2 Dal., 318; *City of Mobile v. Eslava*, 16 Pet., 247.

§ 76. It seems that a state legislature has a right to declare by law that estates tail shall become estates in fee simple in the tenant in tail, especially when all parties are before it. Such an act would not affect existing rights, because there exist no vested rights in the issue of the tenant in tail till his death. And if the legislature can do it by general law, they can do it by special law, or by resolution, which is the same thing. *De Mill v. Lockwood*, 3 Blatch., 68; *Croxall v. Shererd*, 5 Wall., 268.

§ 77. There is no such vested right in a judgment, in the party in whose favor it is rendered, as to preclude its re-examination and vacation in the ordinary modes provided by law, even though an appeal from it may not be allowed. And an award by commissioners of damages for property taken for public use, when approved by a court, possesses no greater sanctity. *Garrison v. City of New York*, 21 Wall., 196.

§ 78. There is nothing in the constitution of the United States which prohibits the legislature of a state or territory from exercising judicial functions, nor from passing an act which divests rights vested by law, provided its effect be not to impair the obligation of contracts. Contracts are not impaired but confirmed by certain acts. *Randall v. Kreiger*, 23 Wall., 137.

§ 79. It cannot be objected that an act of the legislature of a territory, confirming in the grantee a title conveyed under power of attorney given by a husband and wife, the deed being before ineffectual for want of a law of the territory authorizing the execution of such an instrument by a wife, destroys vested rights, the husband, who was the owner of the land having obtained the purchase money, and this having become a part of his estate and passed to his wife on his death. *Ibid.*

§ 80. Searches and seizures.—The right to be secure in one's house is not a right derived from the constitution of the United States, but existed long prior thereto at common law, and cannot be said to come within the meaning of the words "right, privilege and immunity granted or secured by the constitution of the United States." *United States v. Crosby*, 1 Hughes, 457.

§ 81. Summary process for the collection of debts due the government is not a search warrant, and may issue without affidavit. *Murray v. Hoboken Land and Improvement Co.*, 18 How., 272 (§§ 676-689).

§ 82. Section 49 of the act of July 1, 1868 (15 Statutes at Large, 144), which gives supervisors of the internal revenue the right to examine such books and papers of bankers, brokers, etc., as are connected with the operations of the internal revenue laws, is not unconstitutional either as being a violation of that provision of the constitution which protects persons against unreasonable searches and seizures, or of the provisions which protect parties from being compelled to testify against themselves in criminal prosecutions. *Stanwood v. Green*, 2 Abb., 189; *In re Strause*, 1 Saw., 605; *Stockwell v. United States*,\* 2 Int. Rev. Rec., 88; *United States v. Three Tons of Coal*, 6 Biss., 383; *United States v. Distillery No. 28*, 6 Biss., 487; *In re Platt*, 7 Ben., 262.

§ 83. The restriction in the fourth amendment to the constitution of the United States against violating the right of persons to be secure in their persons against unreasonable seizures, and the restriction in the fifth amendment against depriving of liberty without due process of law, have no relation to the subject of extradition for crime as regulated by treaty. *In re De Giacomo*, 12 Blatch., 401.

§ 84. The provision in the constitution that no warrant shall issue except upon probable cause, supported by an oath or affirmation, describing the person to be seized, is not satisfied by the affidavit of an officer, who, upon the relation of others whose names are not disclosed, swears that, upon information, he has reason to believe, and does believe, the person charged has committed the offense charged. In the Matter of a Rule of Court Prescribing the Duties of Circuit Court Commissioners in Certain Cases, 8 Woods, 502.

§ 85. The clause of the constitution which requires that warrants shall be founded upon probable cause, supported by oath or affirmation, does not apply to a warrant for a debt due as a penalty for the violation of a city by-law. *Costin v. Corporation of Washington*, 2 Cr. C. C., 257.

§ 86. The provision in section 49 of the act of congress of July 20, 1868, empowering a supervisor of internal revenue to examine premises, and to issue summons requiring persons to appear before him, to testify under oath and produce their books and papers, is not unconstitutional as violating the provisions of the fourth amendment guarantying security against unreasonable searches and seizures. *In re Meador*, 1 Abb., 817.

§ 87. Cruel punishments.—Capital punishment by shooting, for murder in the first degree, is not a cruel or unusual punishment within the meaning of the eighth amendment to the constitution of the United States. *Wilkinson v. Utah*, 9 Otto, 134.

§ 88. Faith and credit.—Under sec. 1 of art. IV, and the laws of congress in pursuance thereof, the judgment of a state court is conclusive in the courts of all the other states wherever the same matter is in controversy, subject only to inquiry as to the jurisdiction of the court rendering it and notice to the defendant. *Christmas v. Russell*, 5 Wall., 290; *Westerwelt v. Lewis*, 2 McL., 512; *Whitaker v. Bramson*, 2 Paine, 220; *Hampton v. McConnell*, 3 Wheat., 234; *Warren Manuf'g Co. v. Aetna Ins. Co.*, 2 Paine, 507; *Mills v. Duryee*, 7 Cr., 483; *Thompson v. Whitman*, 18 Wall., 457; *Public Works v. Columbia College*, 17 Wall., 521; *McElmoyle v. Cohen*, 18 Pet., 325; *Pennoyer v. Neff*, 5 Otto, 732. See JUDGMENTS.

§ 89. The clause requiring each state to give full faith and credit to the public acts, records, etc., of the other states, does not oblige a state to recognize the validity of a marriage entered into by citizens of one state in another in contravention and fraud of the laws of the former. *Ex parte Kinney*, 3 Hughes, 9 (§§ 883-895).

§ 90. A state law providing that no action shall be maintained upon a judgment, rendered in another state, upon a cause of action which would have been barred by the statutes of limitation of the former state, if the action were brought therein, is in conflict with sec. 1 of art. IV, providing that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and the laws of congress in pursuance thereof. *Christmas v. Russell*, 5 Wall., 290.

§ 91. Under that clause of the constitution which provides that full faith shall be given in each state to records, etc., of every other state, a plea to an action on a judgment is bad in a federal court, which would be bad in the courts of the state in which the judgment was rendered. *Armstrong v. Carson*, 2 Dal., 304; *Pennoyer v. Neff*, 5 Otto, 732.

§ 92. Under that clause of the constitution which provides that each state shall give full effect and credit to the judicial proceedings, etc., of every other state, and the laws of congress

enacted thereunder, there is nothing to prevent states from passing acts of limitation to bar suits on judgments rendered in another state, even though the terms of the act are such that in a particular case there was no time when suit could be commenced within the state. *Bank of Alabama v. Dalton*, 9 How., 528.

§ 93. That clause of the constitution which provides that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, relates only to the validity and effect of a judgment rendered in one state when proved in another. It does not require that judgments in one state shall be followed by the courts of other states as a matter of authority in other similar cases. *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 3 McC., 611.

§ 94. Guaranty of a republican form of government.— Under the article of the constitution providing that the United States shall guaranty to each state in the Union a republican form of government, it rests with congress to decide what government is the established one in a state when that becomes a question. The decision of this question is political and not judicial in its nature, and the decision of congress on the subject is final, and cannot be questioned by any other tribunal. *Luther v. Borden*, 7 How., 42. See § 123.

§ 95. The duty of the general government to guaranty a republican form of government to every state does not secure to women the right of suffrage. A republic can exist without universal suffrage. *Minor v. Happersett*, 21 Wall., 162 (§§ 806-815).

§ 96. Under the clause of the constitution which provides that the United States shall protect each state from domestic violence, it rests with congress to determine the means proper to be adopted to fulfil this guaranty, and congress having vested the right to call out the militia to quell insurrection in the president, upon the application of the legislature or executive of a state, it is his duty to determine who constitute the proper and lawful state government, and his decision is conclusive and cannot be questioned by the courts. The question is a political one, and the judiciary are bound by the decision of the political branch of the government. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, the statute constitutes him the sole and exclusive judge of the existence of those facts. *Luther v. Borden*, 7 How., 42.

§ 97. Legislative construction.— A statute construing a former statute, while it may not affect rights existing prior to its enactment, yet, inasmuch as the legislature has a right to pass a law for the future that such a statute shall be held to mean so and so, such a declaratory statute is equivalent to the passage of a statute of that character for the future, and is a valid law as to future transactions. *Stebbins v. Board of Commissioners of Pueblo County*, 2 McC., 197.

§ 98. Statutes declaratory of the proper construction of a law are unconstitutional and void as far as they affect past transactions. The construction of the law is a judicial act, and cannot be performed by the legislature, though it seems that such declaratory statute may operate as a rule regulating future transactions. *Union Iron Co. v. Pierce*, 4 Biss., 330; *Koshkonong v. Burton*, 14 Otto, 877.

§ 99. The declaration of a state legislature, that a law previously passed is void, because in conflict with the constitution of the state, can have no weight as authority. It is the opinion of one legislature against another, and is not entitled to so much weight as a continuous and contemporaneous exposition of the law to the contrary. *Terrett v. Taylor*, 9 Cr., 51.

§ 100. Confirming past acts.— Although a void grant cannot be confirmed by a subsequent act between individuals, yet it is otherwise as to confirmation by statute; and the legislature may, by statute, confirm a deed or grant which was absolutely void at the time of confirmation. *Seabury v. Field*, McAl., 7; *Friedman v. Goodwin*, id., 148.

§ 101. An act of a state legislature confirming a title to land in that state, which was conveyed by an executor appointed under the laws of another state, is a legislative, and not a judicial, act. *Wilkinson v. Leland*, 2 Pet., 660.

§ 102. An act of a legislature confirming and validating sales of real estate made under the orders of the probate courts to purchasers in good faith, for a valuable consideration, where there have been errors, omissions and defects of form in the proceedings, is unconstitutional and void when applied to sales under the order of the probate court without jurisdiction. *Seaverns v. Gerke*, 3 Saw., 868.

§ 103. Authorizing sale by administrator.— The private act of the legislature of a state, authorizing an administrator, upon order of the proper court, to sell, at private sale, such part of the real estate of the intestate as might be necessary for the payment of his debts, and requiring the sale to be approved by the court before it should be complete, is held to be within the constitutional power of the legislature, although the act requires no notice to heirs, and the same subject is regulated by general acts. *Florentine v. Barton*, 2 Wall., 210; *Watkins v. Holman*, 16 Pet., 59.

§ 104. **Delegation of power.**— The appointment of a railroad commission to fix schedules for the government of railroad companies is no delegation of the power vested in the legislature "to pass laws to regulate freight and passenger tariffs," and is therefore valid. *Tilley v. Savannah, etc., R. Co.*, 5 Fed. R., 641 (§§ 2148-57).

§ 105. **Unjust laws.**— A state law which directs the settlement of the accounts of a debtor of the state without notice to him, and provides for a lien on his property for the balance due, is not therefore unconstitutional and void. Though a law may be unjust, it cannot be held void unless violating a constitutional provision. *Livingston v. Moore*, Bald., 438.

§ 106. **Impeachment.**— Under that clause in the constitution providing that the president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors, a district judge of the United States was removed from office on conviction in the senate of the following charges: 1. For misbehavior as a judge in ordering the delivery to the claimant of goods seized by the collector without requiring security. 2. In refusing to hear evidence offered on the part of the United States to show a forfeiture of said goods. 3. In refusing to allow the United States to appeal from his decree, in a case of admiralty and maritime jurisdiction, where the matter in dispute exceeded \$300. 4. For appearing on the bench, for the purpose of administering justice, in a state of total intoxication, . . . and then and there frequently, in a most profane and indecent manner, invoking the name of the Supreme Being. *Pickering's Case*,\* *Serg. Const. L.*, 376.

§ 107. A senator of the United States is not subject to impeachment after he has been expelled from his seat in the senate. He is not, after his expulsion, a civil officer of the United States, within the meaning of the constitution. *Blount's Impeachment*,\* *Whart. St. Tr.*, 250.

§ 108. **Right of petition.**— The first amendment to the constitution, which declares that "congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances," does not authorize congress to punish individuals for disturbing assemblies. Nor is the rule changed by the fourteenth amendment. The same is true of the "right to bear arms," which is guaranteed by the constitution. *United States v. Cruikshank*,\* 1 Woods, 308.

§ 109. **Illegal sentence.**— One was indicted under the act of June 8, 1872, for stealing certain mail-bags of the government. The punishment provided by the statute for that offense is imprisonment for not more than one year, or a fine of not less than \$10 nor more than \$200. The prisoner was sentenced to one year's imprisonment, and to pay \$200, and was committed in execution of the sentence. Having paid his fine, he was again brought before the court at the same term, and an order was entered vacating the former judgment, and he was again sentenced to one year's imprisonment from that date. On a *habeas corpus* from the supreme court, it was held that the imprisonment under this second judgment was contrary to the personal rights of the individual as secured by the constitution, and the prisoner ordered to be discharged. (*Clifford, J.*, dissented.) *Ex parte Lange*, 18 Wall., 163.

§ 110. **Division of municipalities.**— The separation of Alexandria from the state of Virginia could have no effect upon the existing contracts of individuals. Such divisions of territory are purely political. A separation of jurisdiction takes place, but private interests and private contracts remain unaffected. *Korn v. Mutual Assurance Society of Virginia*, 6 Cr., 199.

§ 111. **Vexatious interference with private property.**— The act of the legislative assembly of the District of Columbia, providing that no seats in any show, exhibition or theater shall be marked as reserved unless actually sold before the opening of the show or exhibition, and that a copy of the act be printed, framed and posted on the door of the place of entertainment, is not a police regulation, but is an unwise, vexatious and unlawful interference with the rights of private property, and therefore void. *District of Columbia v. Saville*,\* 1 Mac-Arth., 532.

§ 112. **Obscene literature.**— The law forbidding the depositing in the mails of any obscene or indecent publication is constitutional. *United States v. Bennett*, 16 Blatch., 342.

§ 113. **Treaties made pursuant to authority granted by the constitution** are the supreme law of the land, and state laws in conflict with such treaties are void. *In re Parrott*, 1 Fed. R., 481 (§§ 982-1007). See TREATIES.

§ 114. **Amendment of charters.**— The reserved power of amendment of a charter does not authorize the legislature to employ it as a means for violating the constitution and treaties of the Union. *Ibid.* See CORPORATIONS.

§ 115. **Enjoining acts under void law.**— Where a person comes into court and asks that the officers of the government be prohibited from carrying out various provisions of the law which concern the details of a business he proposes to undertake, he cannot ask its interference by injunction, for fear that, in the execution of some of those provisions, a right guaran-



tioned him by the constitution may be violated. There must be some unauthorized act done in the first place, or threatened. *Mason v. Rollins*, \* 2 Biss., 99.

§ 116. *Suit against a state.*—A suit against the governor of a state, to restrain him from making a grant in accordance with a law impairing the obligation of a prior contract, is not a suit against the state, and therefore not contrary to the eleventh amendment. *Gray v. Davis*, \* 1 Woods, 420. See *COURTS; STATES*.

§ 117. The eleventh amendment to the constitution, forbidding suits against a state by citizens of another state, is not violated by a suit brought against a board of state officers to restrain them from carrying out the provisions of an act which is unconstitutional as impairing the obligation of the complainant's contract. *McComb v. Board of Liquidation*, \* 2 Woods, 48.

§ 118. *Restitution to tax-payers.*—The state has power to direct a restitution to tax-payers of a county or other municipal corporation, of property exacted from them by taxation, into whatever form the property may be changed, so long as it remains in the possession of the municipality. The exercise of the power infringes upon no provision of the federal constitution. A law ordering the distribution of the stock of a railroad company, subscribed for by the county, among the tax-payers of the county, the stock having been paid for by taxation, is not unconstitutional. *Commissioners v. Lucas*, \* 3 Otto, 108.

§ 119. *Enforcement of act may be enjoined.*—When the circuit court of the United States declares to be unconstitutional a law repealing the charter of a corporation and making the exercise of the franchise granted by its charter a penal offense, it may restrain by injunction the enforcement of the repealing act by the officers charged with that function. *State Lottery Co. v. Fitzpatrick*, \* 3 Woods, 222.

§ 120. *Selection of jurors.*—The act of the state of Louisiana of March 13, 1877, providing for the appointment, by the judges of the principal courts in the city of New Orleans, of two commissioners, whose duty it is made to select impartially from the citizens of the parish, qualified to vote, the names of not less than one thousand good and competent men to serve on juries; and requiring these names to be placed in a box, and from thence drawn the general panel for each term, is held not to be open to any constitutional objection. *Ex parte Wells*, 3 Woods, 128.

## II. MISCELLANEOUS CASES ON THE POWERS OF THE STATE AND FEDERAL GOVERNMENTS.

[See *GOVERNMENT; STATES*.]

### 1. *In General.*

**SUMMARY**—*Right of secession; treason against federal government*, §§ 121, 124.—*Transfer of bonds*, § 122.—*Power to reconstruct rebellious states*, § 123.—*Validity of acts of rebellious states*, § 125.—*Acts in aid of rebellion*, § 126.—*Temporary governments in rebellious states*, § 127.—*State militia; enforcing federal laws*, §§ 128, 129.—*Compacts between states*, §§ 130, 131.—*Admission of Mississippi; navigable rivers*, § 132.

§ 121. The Union is not a compact between the states, from which they may withdraw at pleasure, but a permanent, indissoluble union, by the constitution, which is the supreme law of the land. All persons, therefore, who made war upon the United States in aid of secession, and all giving aid to the rebellion, were traitors, and subject to punishment as such by act of congress. *United States v. Cathcart*, §§ 133-139. See *STATES; WAR*.

§ 122. The act of the national treasury department in dispensing with the necessity of procuring the signature of the governor of Texas to validate a transfer of bonds, which condition was imposed by the United States itself, did not prejudice the rights of that state, and no title to the bonds passed. *Texas v. White*, §§ 140-160.

§ 123. The authority of congress to re-establish its relations with rebellious state governments is derived from the obligation of the United States to guaranty to each state a republican form of government, and in the exercise of such power it may exercise its discretion in its choice of means to accomplish the end. The government of Texas, therefore, organized under the Reconstruction Acts, was the lawful representative of the state. *Ibid.* See § 94.

§ 124. The states are bound to the United States in a close union, and cannot withdraw from it at pleasure. Notwithstanding their ordinances of secession, the rebellious states throughout the rebellion remained states of the Union. *Ibid.*

§ 125. All acts of the rebellious governments, necessary to peace and order among citizens, such as acts regulating marriage, conveyances of property, and remedies for injuries, etc., must be regarded as proceeding from actual though unlawful governments, and therefore valid; but all acts in furtherance of rebellion or in derogation of the just rights of citizens,

§§ 126-132. CONSTITUTION AND LAWS.—POWERS OF GOVERNMENT.

and acts of like nature, must be regarded as null and void. (a) *Ibid.* As to War of Rebellion, see WAR.

§ 126. The act of the legislature of Texas, in disposing of bonds of the United States which it held in consideration of cotton cards and medicines furnished the state after it had adopted the ordinance of secession, was clearly one in aid of the rebellion, and therefore the receivers of the bonds acquired no title thereto. *Ibid.*

§ 127. So long as the rebellion lasted, the president had the power to institute temporary governments within such insurgent districts as were occupied by federal troops, and to take measures for the restoration of faithful state governments. *Ibid.*

§ 128. While a state cannot pass independent laws creating and providing for the punishment of offenses of its citizens in refusing to obey the call of the general government to enter the federal service as state militiamen, after congress has legislated upon the subject, it can pass laws conferring upon its own tribunals the power of enforcing the laws of congress upon the subject, and punishing the offenses therein designated. *Houston v. Moore*, §§ 161-190. See § 240.

§ 129. The act of Pennsylvania of March 28, 1814, providing for the punishment by state courts-martial of those refusing to obey the call of the president, according to the laws of congress, is constitutional. *Ibid.* As to Militia, see WAR.

§ 130. Though the constitution forbids any compact between the states, except with the consent of congress, yet where a state made a compact with the people of a portion thereof who desired to become a separate state, and afterwards congress passed an act, admitting it into the Union as a new state, expressly reciting this compact, such action amounted to consent by congress as demanded by the constitution, and the compact became binding. *Green v. Biddle*, §§ 191-206. See STATES; also § 320, *infra*.

§ 131. A state may surrender any of its sovereign attributes, provided the surrender is made by the people in their sovereign capacity; and a compact made between two states, by which it was stipulated that the laws of one should govern certain lands in the other, is binding. *Ibid.*

§ 132. The act of congress admitting the state of Mississippi into the Union, and providing that the navigation of the Mississippi and its navigable tributaries should remain free and unobstructed, was not intended to rob the state of any of its necessary attributes as an independent sovereign, nor to inhibit the power, inseparable from every efficient government, to devise and to execute measures for the improvement of the state, although such measures might induce or render necessary changes in the channels or courses of rivers within the state. *Withers v. Buckley*, §§ 207-209.

[NOTES.— See §§ 210-320.]

UNITED STATES v. CATHCART.

(Circuit Court for Ohio: 1 Bond, 556-571. 1864.)

Opinion by the COURT.

STATEMENT OF FACTS.— In the first of these cases, a special demurrer to the indictment has been filed; and in the second, there is a motion to quash. The indictments in both cases are substantially the same in their structure; and the questions raised on the demurrer and in the motion to quash, being the same, it will be unnecessary to consider them separately, as the judgment in one case will be decisive of the other. The views now stated by the court have special reference to the grounds of demurrer in Cathcart's case.

The indictment contains two counts. The first count avers that there is now existing an open and public war or rebellion, carried on with force and arms by the so-called Confederate States of America, against the government and laws of the United States; and that the defendant, owing allegiance to the government of the United States, in violation of such allegiance has levied war against the same by banding together with others in military array; and thus has committed treason against the United States. The second count, after reciting the existence of the rebellion or war, as averred in the first count, charges that the defendant knowingly and wilfully conspired with others and

(a) *Williams v. Bruffy*, 6 Otto, 191, *Hannauer v. Woodruff*, 15 Wall., 433; *Evans v. City of Richmond*, Chase's Dec., 554; *Daniels v. Tearney*, 19 Otto, 418.

did assist and give aid and comfort to those in rebellion or war against the United States, and in the execution of his traitorous adhesion to the enemies of the United States committed several overt acts of treason which are specifically set forth, but which it is unnecessary here to recite.

The first count is based on the first section of the act of congress of July 17, 1862, to suppress insurrection, punish treason, etc., which provides that every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death or fine and imprisonment, as the court may direct. The second count is based on section 2 of said act, which declares "that if any person shall hereafter incite, set on foot, assist or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid and comfort thereto, or shall engage in, or give aid and comfort to any such existing rebellion or insurrection, and be convicted thereof, shall be liable to fine or imprisonment, or both, at the discretion of the court." 12 Laws of U. S., 589.

There are several exceptions to the indictment which are set out in the special demurrer. The first one stated has been abandoned and need not be noticed. The second exception is for duplicity in the second count in averring a conspiracy of several persons to aid in several distinct offenses. 3. Misjoinder of a count for felony and for a misdemeanor. 4. No averment that the crimes charged were committed within any county in the southern district of Ohio. 5. Repugnance in both counts in averring the crimes charged to have been committed against the government of the United States and also the people of the United States. 6. The crimes are charged to have been committed against the allegiance of the defendant, when they can only be against obedience, and because of the agreement of the state of Ohio and of all the other states to the constitutional compact binding on the citizens of Ohio and of each state so long as the compact remained. 7. That treason or conspiracy against the United States, after the refusal of some of the states to continue the constitutional compact, are no longer possible.

The sixth and seventh causes of demurrer, involved also in the motion to quash, are yet to be considered. They have been recited, as set out in the demurrer, in a previous part of this opinion, and it is not necessary to restate them here. Both present substantially the same question, and may, therefore, be discussed together. They affirm that, from the facts alleged in the indictment, it is impossible that the crime of treason against the government of the United States can be committed. In a legal sense the demurrer admits the truth of the facts alleged in the indictment. One of these facts is, that the United States is now engaged in a war for the suppression of a rebellion against the government by the people of certain states, aiming at the overthrow of the constitution and the establishment of another government. It is insisted that the states in rebellion have abrogated the compact by which they were bound to the Union, and that, this compact being dissolved by their ordinances of secession, neither a citizen of one of the states thus seceding, nor of any state not involved in the acts of secession, can commit the crime of treason against the government of the United States.

In support of this position, certainly somewhat startling in its character, it is insisted that the constitution, instead of creating an actual and efficient government for the whole people of the United States, is a mere league or compact, from which any state, or any number of states, may at any time withdraw, with or without cause, and without or against the consent of the people of the

other states, as caprice, passion or interest may dictate; that the states, when they entered into the Union and became parties to this league or compact, were sovereign and independent; that the allegiance of the people of each state was due exclusively to the state in which the citizen had his domicile, and the allegiance being inalienable and indivisible, could not be and has not been transferred, in whole or in part, to the government of the United States, and remains, therefore, with the people of the individual states, whose obligations of allegiance are wholly due to the state in which they live; that when the people of a state, in any way they may see proper to prescribe, ignore or repudiate such league or compact, they are thereby absolved from all obligation of obedience or allegiance to the government of the United States; and that, if they take the attitude of armed rebellion against it, with the avowed purpose of its overthrow, they cannot be punished as rebels or traitors. And as the necessary and logical result of this theory, it is urged that if a citizen or resident of a state which has not seceded, but which remains faithful and loyal to the government, adheres to those thus in rebellion, and supports and sustains them in their criminal attempts, he is not guilty of treason and cannot be held accountable for that crime, under the laws or authority of the United States.

These are in substance the points made by counsel in support of the two last grounds of demurrer. The argument has been greatly extended, and the domain of political metaphysics has been fully explored in its progress. I have listened patiently to the statement of the views of counsel, though not without some surprise that they should have been urged with such apparent gravity and earnestness, before this court, on a purely legal question, with the full knowledge that they were in direct conflict with the solemn and well-considered adjudications of the supreme court of the United States, and the views of numerous elementary writers of the highest reputation as jurists. I am at a loss to comprehend on what grounds counsel could have supposed this court would sustain a theory so entirely at variance, not only with the decisive authorities to which I shall refer, but with the uniform action of every department of the general government from its organization to the present day. It is obvious that the counsel throughout his argument has addressed himself to the question, what, in his judgment, the structure of our government should have been, and not what it is. It seemed, therefore, to the court, that however appropriate the peculiar views of counsel may have been, if urged in a popular assembly to rectify a supposed erroneous public sentiment, or in a convention to amend the constitution, or reconstruct the government, they were wholly out of place on the question whether the averments and structure of the indictment in this case were sufficient in law to put the defendant on trial before a traverse jury. The manner of counsel was, however, unexceptionably courteous, and his views were presented with seeming earnestness and sincerity. It is due, therefore, to the occasion, and to the position I occupy, that I should state some of the reasons why I cannot assent to the principles he has urged upon the attention of the court. And, in the first place, I will refer to some of the adjudicated cases in which these principles have been discussed and settled by men whose intellectual power and profound knowledge of the structure of our government entitle them to the highest measure of respect and veneration. And I may remark here, that in so far as these principles are embodied and propounded in the judicial decisions of the supreme court, they are positively authoritative on this court, as a subordinate court of the United States.

§ 133. *The constitution of the United States was ordained, not by the states, but by the people of the states.*

In the case of *Martin v. Hunter*, 1 Wheat., 304 (3 Pet. Cond. R., 575), the supreme court says: "The constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by the *people* of the United States. There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary, to extend or restrain those powers according to their own good pleasure, and to give them *paramount and supreme authority*." The opinion of the court in this case was delivered by Justice Story, and was concurred in by the whole court, including Chief Justice Marshall.

§ 134. *The government of the Union, though limited in its powers, is sovereign within those limits.*

In *McCulloch v. State of Maryland*, 4 Wheat., 316 (§§ 380-398, *infra*), Chief Justice Marshall delivering the opinion of the court, it is decided "that the government of the Union is a government of the people; it emanates from them; its powers are granted by them, and are to be exercised directly on them, and for their benefit." Again: "The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, when made in pursuance of the constitution, form the *supreme law of the land*."

§ 135. *The constitution is not a compact between sovereign states, but a supreme law over all.*

Judge Story, in discussing the question whether the constitution of the United States is a compact between the several states, remarks that "there is nowhere found upon the face of the constitution any clause intimating it to be a compact, or in any wise providing for its interpretation as such. On the contrary, the preamble emphatically speaks of it as a solemn ordinance and establishment of government. The language is: "*We, the people of the United States, do ordain and establish this constitution for the United States of America*." Com. on the Constitution (Abr. ed.), 117. And again, page 119, the learned author says: "But that which would seem conclusive on the subject is the very language of the constitution itself. This constitution, says the sixth article, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." And he adds: "If it is the supreme law, how can the people of any state, either by any form of its own constitution or laws, or other proceedings, repeal, abrogate, or suspend it?" And again he says: "This of itself imports legal obligation, *permanence* and uncontrollability by any but the authorities authorized to alter or abolish it." And again, on this subject, the learned writer says, page 684: "It would be a perfect solecism to affirm that a national government should exist with certain powers, and yet in the exercise of those powers should not be supreme."

§ 136. *The sphere of action of the federal government is beyond the judicial process of the states.*

I will add to these references a brief notice of the case of *Ableman v. Booth*, 21 How., 506, decided by the supreme court of the United States in 1858, which sustains fully the general doctrines affirmed by the prior decisions of that court. I make this reference with the more satisfaction because the opinion was written and delivered by Chief Justice Taney, a judge eminent for

his profound legal learning, and who has never been charged with extreme liberality in construing the constitution of the United States, and defining the powers of the general government. In that case, a judge of a state court in Wisconsin had discharged a party on *habeas corpus* who was in custody under the authority of the United States. The supreme court of the state sustained the action of the lower judge; and the case was removed to the supreme court of the United States by writ of error, in accordance with section 25 of the judiciary act of 1789. I shall give but brief quotations from the opinion of the court, indicating their views on the subject under consideration. On page 516, the court say: "Although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is *limited* and *restricted* by the constitution of the United States. And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye." Again, on page 517, the court say: "The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be obtained there would be little danger from abroad; and, to accomplish this purpose, it was felt by the statesmen who framed the constitution, and by the *people who adopted it*, that it was necessary that many of the rights of sovereignty which the states then possessed should be ceded to the general government; and that in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a state, or from state authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established." And the court further say: "The language of the constitution by which this power is granted is too plain to admit of doubt, or to need comment. It declares that 'this constitution, and the laws which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.'" On page 524, the court further say: "Nor is there anything in the supremacy of the general government, or the jurisdiction of its tribunals, to awaken the jealousy or offend the natural and just pride of state sovereignty. Neither this government nor the powers of which we are speaking were forced upon the states. The constitution of the United States, with all the powers conferred on it by the general government, and surrendered by the states, was the voluntary act of the people of the several states, deliberately done, for their own protection and safety against injustice from one another." And they add, page 525: "Now it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among the first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign state to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of this Union. And certainly no faith could be more deliberately and solemnly pledged than that

which every state has plighted to the other states to support the constitution as it is, in all its provisions, until they shall be altered in the manner which the constitution itself prescribes."

§ 137. *The prize cases, 1 Black, 635, applied.*

A still more recent decision of the supreme court, in the prize cases, as they are called (1 Black, 635), strongly affirms the doctrines previously declared by that court. In the very able and lucid opinion of Mr. Justice Grier, giving the views of the court, page 673, he says: "Under the very peculiar constitution of this government, although the citizens owe *supreme* allegiance to the federal government, they owe also a *qualified* allegiance to the state in which they are domiciled." And it may be proper here to remark that the principles enunciated in the case just referred to, are pertinent to the questions before this court on this demurrer in another aspect. The argument of the counsel for the demurrant is, that a citizen of a state cannot be guilty of treason against the United States by adhering to, or giving aid and comfort to, those now in rebellion against the government, because it is a mere insurrection or civil war, waged by the seceding states against the government. But in the prize cases the doctrine is very impressively announced that the rebellion has all the attributes of a foreign or public war, and that all the duties, obligations, disabilities and penalties incident to such a war attach to every citizen. In a word, that those who are *particeps criminis* in the rebellion are not the less *traitors* because they are *rebels*. In that case the court say: "It (the law of nations) contains no such anomalous doctrine as that which the court are now for the first time desired to pronounce—to wit: that insurgents who have risen against their sovereign, expelled her courts, established a revolutionary government, organized armies and commenced hostilities, are not *enemies* because they are *traitors*; and a war levied on the government by traitors in order to dismember and destroy it, is not *war*, because it is an insurrection." And again the court say: "When the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the courts of justice cannot be kept open, *civil war* exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land." And further on in the opinion, as descriptive of the true character of the present rebellion, the court say: "It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force; south of this line is enemies' territory, because it is held in possession by an organized, hostile and belligerent power."

§ 138. *The Union is not a compact between the several states, from which any one or more may withdraw at pleasure.*

Such are some of the deliverances of the highest judicial tribunal of the Union. They repudiate emphatically the mischievous heresy that the union of the states under the constitution is a mere league or compact, from which a state, or any number of states, may withdraw at pleasure, not only without the consent of the other states, but against their will. They deny the assumption that full and unqualified sovereignty still remains in the states or the people of a state, and affirm, on the contrary, that, by express words of the constitution, solemnly ratified by the people of the United States, the national government is supreme within the range of the powers delegated to it; while the states are sovereign only in the sense that they have an indisputable claim to the exercise of all the rights and powers guarantied to them by the constitution of the United States, or which are expressly or by fair implication reserved to them.

I might, perhaps, close this opinion here. But the course of the learned counsel in his argument seems to justify, if it does not call for, some additional views. And the first remark is, that apart from the light which the high judicial authorities to which I have referred have thrown on the subject under discussion, I should have arrived at the same conclusions which they announce. It is my strong conviction that the language of the constitution, in connection with the known history of its origin, formation and adoption, leaves no room for a doubt as to the character and structure of the government which it created. Its history is well authenticated, and bears upon every page the indelible stamp of truth. I cannot, on an occasion like this, refer to or adduce the many facts which throw light upon the views and intentions of the eminent patriots and statesmen to whom we are indebted for our inimitable constitution. One thing is certain, the American people are in no danger of estimating their services too highly, or according to their memories a measure of honor which is not justly their due. With the illustrious Washington at their head, they entered upon the arduous duty of reconstructing the government under circumstances of deep depression and gloom. The confederation under which the Union had for some time existed had proved a lamentable failure, and was on the verge of dissolution from its own inherent weakness. The hearts of the patriots who had toiled and bled in the revolutionary struggle for national liberty and independence were stirred to their inmost depths, from an apprehension that their great achievements would prove fruitless of the results which they had anticipated. They felt deeply the truth that in framing a new structure of government, they must avoid the rock on which the old one had foundered, and must, above all things, incorporate an element of power to bind the states in an *indissoluble* national union. This is plainly indicated in the preamble, which declares as one of the objects of the constitution, the formation of "a more perfect Union," and is apparent not only from the debates in the convention, but from the language used throughout the entire instrument. After months of anxious toil and earnest deliberation, the present constitution was agreed to, and submitted to the people for their sanction and adoption. It was adopted by conventions in all the states, elected by the people for this purpose; and thus as the act of the people became the organic law. Its framers did not claim for it entire perfection; and contemplating the possibility that time would develop some necessary changes, wisely provided for its amendment by the same authority that had *ordained* and *established* it. It is not proposed to enter upon an extended discussion of the powers of the government, under the constitution thus framed and adopted. That it was designed to institute a government of the *people*, and for the *people* of the United States, and to confer upon it, within the powers granted or fairly implied, the attributes of sovereignty or supremacy, cannot admit of a question. There is, in the language of the supreme court in a case before referred to, a *qualified* allegiance due to the state in which the citizen has his domicile, but it is subordinate to the allegiance due to the supreme government. The government, therefore, has a perfect right to exact, and has exacted from every one enjoying its protection, the duty of fidelity and allegiance. And it is certainly a fact, worthy of note, that there is not a word or phrase in the constitution of the United States which gives the least countenance to the theory that a state can obstruct or nullify the authority of the general government, exercised within its constitutional limits. Much less can the supreme folly of giving its sanction to the right of any state, or any number of states, to withdraw at will from the Union, be im-



puted to the constitution. Such a provision could not be viewed in any other light than as a solecism in the structure of a government. It would be substantially a provision for its own dissolution, without the sanction or agreement of the power which created it.

But I am not at liberty to extend this discussion. I may remark, in closing, that there were those in the convention which framed the constitution, and in the conventions of the states which ratified it, who objected to it because it created a national consolidated or supreme government of the United States. There was no difference of opinion then as to the character of the government which the constitution created, but the ground of its opponents was, that it did not conform to their views of what it should be. The counsel has referred in his argument to the resolutions of the legislatures of Virginia and Kentucky, passed in 1798, as giving sanction to the doctrine of the right of a State, at any time, to interpose its authority to prevent or provide a remedy for the unconstitutional exercise of authority on the part of the general government, and that they sanction what is called the right of nullification, or even of secession. I cannot assent to the proposition that, properly understood, they justify such a conclusion. The history of these resolutions is well known to the American people. They were designed for a special political object, which was effected, in part at least, through their instrumentality. They affirmed that the states, being parties to the constitutional compact, "in case of a deliberate, palpable and dangerous exercise of powers not granted by the compact, have a right, and are in duty bound, to interpose to prevent the *progress* of the evil." A distinguished statesman has well observed in commenting on these resolutions, that "the sort of interposition intended was left in studied obscurity." But Mr. Madison, who was the author of the resolutions adopted by the Virginia legislature, in his report to that body in 1799, asserts distinctly that no extra constitutional measures were intended. And thirty years later, during the administration of General Jackson, when certain prominent southern politicians insisted that nullification was the proper remedy, in case of an invasion of the rights of a state, solemnly and earnestly protested against this construction of the Virginia resolutions. "He earnestly maintained that the separate action of an individual state was not contemplated by them, and that they had in view nothing but the concerted action of the states to procure a repeal of unconstitutional laws, or an amendment of the constitution." And in 1832, when Mr. Calhoun had succeeded in inducing South Carolina to pass an ordinance of nullification, on the avowed ground of the unconstitutionality of the laws imposing duties on imports, and that state was on the verge of open rebellion, the sturdy arm of Andrew Jackson was raised to crush it in the bud. Before resorting to force for this purpose, with a paternal anxiety for the people of that state who had been deluded by the false political teachings of their leaders, he issued his memorable proclamation, addressed to the people of that state. It is a document which well deserves to be cherished in the memories of the American people to the latest ages. It is alike remarkable for the earnest devotion of its author to the union of the states, the elevated patriotism which is exhibited in every line, and its able and unanswerable exposition of the true principles and theory of the government. The fallacies of the nullification party were held up as dangerous political heresies. Its effects upon the whole country were electrical. It was clothed with the power of truth, and carried conviction to the minds of all men of all political parties whose

intellects were not so constructed as to be impervious to the voice of reason, or dead to the impulses of patriotism.

But though the iron will and sturdy sense of President Jackson had thoroughly rebuked and arrested the heresy for the time, the deadly poison was not wholly eradicated from the southern mind. After the lapse of thirty years, its baleful effects have appeared in a new and more malignant form. That which was nullification in 1832, is secession in 1860.

§ 139. *A citizen of the loyal states, extending aid to the late rebellion, was guilty of treason against the United States.*

The political leaders in the southern states, by means which I do not care to recite, have so far succeeded in their treasonable machinations as to induce those states madly to leap into the fiery vortex of secession. They have gone through the mockery of passing ordinances, in which they declare they are no longer parties of the solemn compact of government, and repudiate all allegiance to it. They have inaugurated war against that government and have been in armed rebellion against it for nearly three years. If successful, the overthrow of the government is the inevitable result, for secession, having no warrant in the constitution, is *revolution*. The authorities charged with the solemn duty of preserving and perpetuating the government, have found it imperatively necessary to meet force by force, and have adopted measures to repel and subdue the criminal designs of those in rebellion. The country is in a state of war — a war which the adjudications of the supreme court have declared to be lawful and constitutional. A struggle is in progress which, at one time, jeopardized the very life of the government. In such a crisis, it is now gravely urged in a court deriving its being and authority from a constitution which the judges are sworn to support, that a citizen of the patriotic and loyal state of Ohio, charged with criminal complicity in the rebellion, cannot be guilty of treason, because the revolted states had a right to withdraw from the Union; and, as a logical and legal result, have virtually destroyed the entire fabric of the government, and absolved the people of the United States from all obligation of allegiance to it! As a judge, and as a citizen of the United States, I am constrained to enter my protest against such a dangerous perversion of the principles of the constitution. To sanction such a position, under circumstances now existing in our country, implies, in my judgment, a most unenviable condition of intellect, and the possession of a measure of courage, physical and moral, to which I can lay no claim. The character and tendencies of this doctrine are not now to be settled by unmeaning abstractions and metaphysical speculations. The period when these could have been available is gone by, and the bitter fruits of this sad error are now fully developed in its practical results. It has plunged those who have been its deluded victims into one of the deadliest conflicts the world has ever witnessed. Its blighting influences are now frightfully apparent in the wide-spread suffering, desolation and ruin which it has brought upon the states which have so madly raised the banner of revolt. The loyal states, too, have laid liberal offerings on the altar of sacrifice. In their patriotic devotion to the government of their fathers, and impelled by a stern, unconquerable purpose of defending, preserving and perpetuating it, they have cheerfully borne a severe trial of their energies, and profusely lavished their treasures and poured out their blood. The sacrifice, though costly, we may well hope, will be fully repaid by the end to be achieved.

I have now only to say, that, upon none of the grounds urged, can the exceptions to this indictment be sustained. The demurrer, as also the motion to quash in the case of Catherine Parmenter, are therefore overruled.

## TEXAS v. WHITE.

(7 Wallace, 700-743. 1868.)

Opinion by CHASE, C. J.

STATEMENT OF FACTS.—This is an original suit in this court, in which the state of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the national government, and to compel the surrender of the bonds to the state. It appears from the bill, answers and proofs, that the United States, by act of September 9, 1850, offered to the state of Texas, in compensation for her claims connected with the settlement of her boundary, \$10,000,000 in five per cent. bonds, each for the sum of \$1,000; and that this offer was accepted by Texas. One-half of these bonds were retained for certain purposes in the national treasury, and the other half were delivered to the state. The bonds thus delivered were dated January 1, 1851, and were all made payable to the state of Texas, or bearer, and redeemable after the 31st day of December, 1864. They were received in behalf of the state by the comptroller of public accounts, under authority of an act of the legislature, which, besides giving that authority, provided that no bond should be available in the hands of any holder until after indorsement by the governor of the state.

After the breaking out of the rebellion, the insurgent legislature of Texas, on the 11th of January, 1862, repealed the act requiring the indorsement of the governor (Acts of Texas, 1862, p. 45), and on the same day provided for the organization of a military board, composed of the governor, comptroller and treasurer; and authorized a majority of that board to provide for the defense of the state by means of any bonds in the treasury, upon any account, to the extent of \$1,000,000. Texas Laws, 55. The defense contemplated by the act was to be made against the United States by war. Under this authority the military board entered into an agreement with George W. White and John Chiles, two of the defendants, for the sale to them of one hundred and thirty-five of these bonds, then in the treasury of the state, and seventy-six more, then deposited with Droege & Co., in England; in payment for which they engaged to deliver to the board a large quantity of cotton cards and medicines. This agreement was made on the 12th of January, 1865. On the 12th of March, 1865, White and Chiles received from the military board one hundred and thirty-five of these bonds, none of which were indorsed by any governor of Texas. Afterward, in the course of the years 1865 and 1866, some of the same bonds came into the possession of others of the defendants, by purchase, or as security for advances of money. Such is a brief outline of the case. It will be necessary hereafter to refer more in detail to some particular circumstances of it.

§ 140. *The allegation that the state has no right to sue is disproved by the evidence.*

The first inquiries to which our attention was directed by counsel arose upon the allegations of the answer of Chiles, (1) that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the state of Texas; and (2) that the state, having severed her relations with a majority of

the states of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the constitution and government of the United States, has so far changed her *status* as to be disabled from prosecuting suits in the national courts. The first of these allegations is disproved by the evidence. A letter of authority, the authenticity of which is not disputed, has been produced, in which J. W. Throckmorton, elected governor under the constitution adopted in 1866, and proceeding under an act of the state legislature relating to these bonds, expressly ratifies and confirms the action of the solicitors who filed the bill, and empowers them to prosecute this suit; and it is further proved by the affidavit of Mr. Paschal, counsel for the complainant, that he was duly appointed by Andrew J. Hamilton, while provisional governor of Texas, to represent the state of Texas in reference to the bonds in controversy, and that his appointment has been renewed by E. M. Pease, the actual governor. If Texas was a state of the Union at the time of these acts, and these persons, or either of them, were competent to represent the state, this proof leaves no doubt upon the question of authority.

§ 141. *Whether Texas was a state of the Union, and whether, therefore, the supreme court has jurisdiction.*

The other allegation presents a question of jurisdiction. It is not to be questioned that this court has original jurisdiction of suits by states against citizens of other states, or that the states entitled to invoke this jurisdiction must be states of the Union. But it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such states. If, therefore, it is true that the state of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it. We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the constitution alone.

§ 142. *The term "state" defined, in connection with its employment in the constitution.*

Some not unimportant aid, however, in ascertaining the true sense of the constitution, may be derived from considering what is the correct idea of a state, apart from any union or confederation with other states. The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed. It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government. It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state. This is undoubtedly the fundamental idea upon which the republican institutions of our own country are

established. It was stated very clearly by an eminent judge, Mr. Justice Paterson, in *Penhallow v. Doane*, 3 Dal., 93, in one of the earliest cases adjudicated by this court, and we are not aware of anything, in any subsequent decision, of a different tenor.

In the constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that constitution designates as the United States, and makes of the people and states which compose it one people and one country. The use of the word in this sense hardly requires further remark. In the clauses which impose prohibitions upon the states in respect to the making of treaties, emitting of bills of credit, and laying duties of tonnage, and which guaranty to the states representation in the house of representatives and in the senate, are found some instances of this use in the constitution. Others will occur to every mind. But it is also used in its geographical sense, as in the clauses which require that a representative in congress shall be an inhabitant of the state in which he shall be chosen, and that the trial of crimes shall be held within the state where committed. And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government. In this latter sense the word seems to be used in the clause which provides that the United States shall guaranty to every state in the Union a republican form of government, and shall protect each of them against invasion. In this clause a plain distinction is made between a state and the government of a state. Having thus ascertained the senses in which the word state is employed in the constitution, we will proceed to consider the proper application of what has been said.

§ 143. *The history of the secession of Texas from the Union.*

The republic of Texas was admitted into the Union, as a state, on the 27th of December, 1845. By this act the new state, and the people of the new state, were invested with all the rights, and became subject to all the responsibilities and duties, of the original states under the constitution. From the date of admission, until 1861, the state was represented in the congress of the United States by her senators and representatives, and her relations as a member of the Union remained unimpaired. In that year, acting upon the theory that the rights of a state under the constitution might be renounced, and her obligations thrown off at pleasure, Texas undertook to sever the bond thus formed, and to break up her constitutional relations with the United States. On the 1st of February (Paschal's Dig. Laws of Texas, 78), a convention, called without authority, but subsequently sanctioned by the legislature regularly elected, adopted an ordinance to dissolve the union between the state of Texas and the other states under the constitution of the United States, whereby Texas was declared to be "a separate and sovereign state," and "her people and citizens" to be "absolved from all allegiance to the United States, or the government thereof." It was ordered by a vote of the convention (id., 80) and by an act of the legislature (Laws of Texas, 1859-61, p. 11), that this ordinance should be submitted to the people, for approval or disapproval, on the 23d of February, 1861. Without awaiting, however, the decision thus invoked, the convention,

on the 4th of February, adopted a resolution designating seven delegates to represent the state in the convention of seceding states at Montgomery, "in order," as the resolution declared, "that the wishes and interests of the people of Texas may be consulted in reference to the constitution and provisional government that may be established by said convention."

Before the passage of this resolution the convention had appointed a committee of public safety, and adopted an ordinance giving authority to that committee to take measures for obtaining possession of the property of the United States in Texas, and for removing the national troops from her limits. The members of the committee, and all officers and agents appointed or employed by it, were sworn to secrecy and to allegiance to the state. Paschal's Dig., 80. Commissioners were at once appointed, with instructions to repair to the headquarters of General Twiggs, then representing the United States in command of the department, and to make the demands necessary for the accomplishment of the purposes of the committee. A military force was organized in support of these demands, and an arrangement was effected with the commanding general, by which the United States troops were engaged to leave the state, and the forts and all the public property, not necessary to the removal of the troops, were surrendered to the commissioners. Texas Reports of the Committee (Library of Congress), 45. These transactions took place between the 2d and the 18th of February, and it was under these circumstances that the vote upon the ratification or rejection of the ordinance of secession was taken on the 23d of February. It was ratified by a majority of the voters of the state.

The convention, which had adjourned before the vote was taken, reassembled on the 2d of March, and instructed the delegates already sent to the congress of the seceding states, to apply for admission into the confederation, and to give the adhesion of Texas to its provisional constitution. It proceeded, also, to make the changes in the state constitution which this adhesion made necessary. The words "United States" were stricken out wherever they occurred, and the words "Confederate States" substituted; and the members of the legislature, and all officers of the state, were required by the new constitution to take an oath of fidelity to the constitution and laws of the new confederacy. Before, indeed, these changes in the constitution had been completed, the officers of the state had been required to appear before the committee and take an oath of allegiance to the Confederate States. The governor and secretary of state, refusing to comply, were summarily ejected from office. The members of the legislature, which had also adjourned and reassembled on the 18th of March, were more compliant. They took the oath, and proceeded on the 8th of April to provide by law for the choice of electors of president and vice-president of the Confederate States. The representatives of the state in the congress of the United States were withdrawn, and as soon as the seceded states became organized under a constitution, Texas sent senators and representatives to the Confederate congress.

In all respects, so far as the object could be accomplished by ordinances of the convention, by acts of the legislature and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them. The position thus assumed could only be maintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or judge, or any other state officer in Texas, who recognized the national authority. Nor was any

officer of the United States permitted to exercise any authority whatever under the national government within the limits of the state, except under the immediate protection of the national military forces. Did Texas, in consequence of these acts, cease to be a state? Or, if not, did the state cease to be a member of the Union?

§ 144. *Of the union of the states.*

It is needless to discuss, at length, the question whether the right of a state to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the constitution of the United States. The union of the states never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the articles of confederation. By these the Union was solemnly declared to "be perpetual." And when these articles were found to be inadequate to the exigencies of the country, the constitution was ordained "to form a more perfect union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual union, made more perfect, is not?

§ 145. *Of the perpetuity and indissolubility of the Union.*

But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the states. Under the articles of confederation each state retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the constitution, though the powers of the states were much restricted, still all powers not delegated to the United States nor prohibited to the states, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the states in union, there could be no such political body as the United States." *Lane County v. Oregon*, 7 Wall., 76. Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the state. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other states was as complete, as perpetual and as indissoluble as the union between the original states. There was no place for reconsideration, or revocation, except through revolution, or through consent of the states.

§ 146. *Ordinance of secession, and acts under it, void, and the state continued in the Union.*

Considered, therefore, as transactions under the constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens

of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the state, as a member of the Union, and of every citizen of the state, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the state did not cease to be a state, nor her citizens to be citizens of the Union. If this were otherwise, the state must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation. Our conclusion, therefore, is, that Texas continued to be a state, and a state of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the national government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

§ 147. *What necessary to enable a state to sue in the supreme court.*

But in order to the exercise by a state, of the right to sue in this court, there needs to be a state government, competent to represent the state in its relations with the national government, so far at least as the institution and prosecution of a suit is concerned. And it is by no means a logical conclusion from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired while relations are greatly changed. The obligations of allegiance to the state and of obedience to her laws, subject to the constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of states and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation waging war upon the United States, senators chosen by her legislature or representatives elected by her citizens were entitled to seats in congress; or that any suit instituted in her name could be entertained in this court. All admit that, during this condition of civil war, the rights of the state as a member and of her people as citizens of the Union were suspended. The government and the citizens of the state, refusing to recognize their constitutional obligations, assumed the character of enemies and incurred the consequences of rebellion.

§ 148. *Power to suppress rebellion and reorganize the states, whence derived.*

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the state with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the national government. The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guaranty to every state in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a state and for the time excludes the national authority from its limits, seems to be a necessary complement to the former. Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the state except that which had been organized for the purpose of waging war



against the United States. That government immediately disappeared. The chief functionaries left the state. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates or supplied more directly the needful restraints.

§ 149. *Emancipation; status of the freedmen; restoration of the state government.*

A great social change increased the difficulty of the situation. Slaves, in the insurgent states, with certain local exceptions, had been declared free by the proclamation of emancipation; and whatever questions might be made as to the effect of that act under the constitution, it was clear from the beginning that its practical operation, in connection with legislative acts of like tendency, must be complete enfranchisement. Wherever the national forces obtained control the slaves became freemen. Support to the acts of congress and the proclamation of the president concerning slaves was made a condition of amnesty (13 Stat. at Large, 737) by President Lincoln in December, 1863, and by President Johnson in May, 1865. Id., 758. And emancipation was confirmed, rather than ordained, in the insurgent states by the amendment to the constitution prohibiting slavery throughout the Union, which was proposed by congress in February, 1865, and ratified before the close of the following autumn by the requisite three-fourths of the states. Id., 774, 775. The new freemen necessarily became part of the people, and the people still constituted the state; for states, like individuals, retain their identity though changed to some extent in their constituent elements. And it was the state, thus constituted, which was now entitled to the benefit of the constitutional guaranty. There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the state.

§ 150. *In the exercise of the power conferred by the guaranty clause, a discretion in the choice of means is necessarily implied.*

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the state to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the constitution. It is not important to review, at length, the measures which have been taken, under this power, by the executive and legislative departments of the national government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smoldered in Texas, the president of the United States issued his proclamation appointing a provisional governor for the state, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended constitution, and to the restoration of the state to her proper constitutional relations.

A convention was accordingly assembled, the constitution amended, elections held, and a state government, acknowledging its obligations to the Union, established.

§ 151. *So long as the war lasted the president could institute temporary government within hostile territory occupied by federal troops.*

Whether the action then taken was, in all respects, warranted by the constitution, it is not now necessary to determine. The power exercised by the president was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the national forces, or take measures, in any state, for the restoration of state government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

§ 152. *The power to carry into effect the clause of guaranty is a legislative power and resides in congress.*

But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in congress. "Under the fourth article of the constitution, it rests with congress to decide what government is the established one in a state. For, as the United States guaranty to each state a republican government, congress must necessarily decide what government is established in the state, before it can determine whether it is republican or not." This is the language of the late chief justice, speaking for this court, in a case from Rhode Island (*Luther v. Borden*, 7 How., 42), arising from the organization of opposing governments in that state. And we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a state deprived of all rightful government by revolutionary violence, though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the state.

§ 153. *The authority of the complainants to bring this suit was derived from the recognized government of Texas.*

The action of the president must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by congress. It was taken after the term of the thirty-eighth congress had expired. The thirty-ninth congress, which assembled in December, 1865, followed by the fortieth congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the constitution, and in the acts known as the reconstruction acts, which have been so far carried into effect, that a majority of the states which were engaged in the rebellion have been restored to their constitutional relations, under forms of government adjudged to be republican by congress, through the admission of their "senators and representatives into the councils of the Union."

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts. But it is important to observe that these acts themselves show that the governments which had been established and had been in actual operation under executive direction, were recognized by congress as provisional, as existing and as capable of continuance. By the act of March 2, 1867 (14 Stat. at Large, 428), the first of the series, these governments were, indeed, pronounced illegal and were sub-

jected to military control, and were declared to be provisional only; and by the supplementary act of July 19, 1867, the third of the series, it was further declared that it was the true intent and meaning of the act of March 2d, that the governments then existing were not legal state governments, and if continued were to be continued subject to the military commanders of the respective districts and to the paramount authority of congress. We do not inquire here into the constitutionality of this legislation so far as it relates to military authority or to the paramount authority of congress. It suffices to say that the terms of the acts necessarily imply recognition of actually existing governments, and that, in point of fact, the governments thus recognized, in some important respects, still exist. What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the state was appointed by the president in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the three exercised executive functions and actually represented the state in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the state. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority. The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence.

§ 154. *If a state imposes restrictions upon the alienation of her property, every person who takes a transfer of such property is affected with notice.*

And the first question to be answered is, whether or not the title of the state to the bonds in controversy was divested by the contract of the military board with White and Chiles? That the bonds were the property of the state of Texas on the 11th of January, 1862, when the act prohibiting alienation without the indorsement of the governor was repealed, admits of no question and is not denied. They came into her possession and ownership through public acts of the general government and of the state, which gave notice to all the world of the transaction consummated by them. And we think it clear that if a state, by a public act of her legislature, imposes restrictions upon the alienation of her property, that every person who takes a transfer of such property must be held affected by notice of them. Alienation in disregard of such restrictions can convey no title to the alienee. In this case, however, it is said that the restriction imposed by the act of 1851 was repealed by the act of 1862. And this is true if the act of 1862 can be regarded as valid. But was it valid? The legislature of Texas, at the time of the repeal, constituted one of the departments of a state government established in hostility to the constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful legislature, or its acts as lawful acts. And yet it is an historical fact that the government of Texas, then in full control of the state, was its only actual government; and certainly if Texas had been a separate state, and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de*

*facto* government, and its acts, during the period of its existence as such, would be effectual, and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary, as to the United States.

§ 155. *When acts of the rebellious governments are to be treated as valid or invalid.*

It is not necessary to attempt any exact definitions within which the acts of such a state government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful, government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.

§ 156. — *the act in question discussed.*

What, then, tried by these general tests, was the character of the contract of the military board with White and Chiles? That board, as we have seen, was organized, not for the defense of the state against a foreign invasion, or for its protection against domestic violence, within the meaning of these words as used in the national constitution, but for the purpose, under the name of defense, of levying war against the United States. This purpose was, undoubtedly, unlawful, for the acts which it contemplated are, within the express definition of the constitution, treasonable. It is true that the military board was subsequently reorganized. It consisted, thereafter, of the governor and two other members, appointed and removable by him; and was, therefore, entirely subordinate to executive control. Its general object remained without change, but its powers were "extended to the control of all public works and supplies, and to the aid of producing within the State, by the importation of articles necessary and proper for such aid."

§ 157. *The contract with White and Chiles was one in aid of rebellion, and therefore vested in them no right to the bonds.*

And it was insisted in argument, on behalf of some of the defendants, that the contract with White and Chiles, being for the purchase of cotton-cards and medicines, was not a contract in aid of the rebellion, but for obtaining goods capable of a use entirely legitimate and innocent, and, therefore, that payment for those goods by the transfer of any property of the state was not unlawful. We cannot adopt this view. Without entering, at this time, upon the inquiry whether any contract made by such a board can be sustained, we are obliged to say that the enlarged powers of the board appear to us to have been conferred in furtherance of its main purpose, of war against the United States, and that the contract under consideration, even if made in the execution of these enlarged powers, was still a contract in aid of the rebellion, and therefore void. And we cannot shut our eyes to the evidence which proves that the act of repeal was intended to aid rebellion by facilitating the transfer of these bonds. It was supposed, doubtless, that negotiation of them would be less difficult if they bore upon their face no direct evidence of having come from the

possession of any insurgent state government. We can give no effect, therefore, to this repealing act. It follows that the title of the state was not divested by the act of the insurgent government in entering into this contract.

§ 158. *The rights of the defendants as bona fide purchasers of the bonds discussed.*

But it was insisted further, in behalf of those defendants who claim certain of these bonds by purchase, or as collateral security, that however unlawful may have been the means by which White and Chiles obtained possession of the bonds, they are innocent holders, without notice, and entitled to protection as such under the rules which apply to securities which pass by delivery. These rules were fully discussed in *Murray v. Lardner*, 2 Wall., 118. We held in that case that the purchaser of coupon bonds, before due, without notice and in good faith, is unaffected by want of title in the seller, and that the burden of proof in respect to notice and want of good faith is on the claimant of the bonds as against the purchaser. We are entirely satisfied with this doctrine. Does the state, then, show affirmatively notice to these defendants of want of title to the bonds in White and Chiles? It would be difficult to give a negative answer to this question if there were no other proof than the legislative acts of Texas. But there is other evidence which might fairly be held to be sufficient proof of notice, if the rule to which we have adverted could be properly applied to this case.

§ 159. *Rights of purchasers of bonds past due, or after they are redeemable.*

But these rules have never been applied to matured obligations. Purchasers of notes or bonds past due take nothing but the actual right and title of the vendors. *Brown v. Davies*, 3 Term R., 80; *Goodman v. Simonds*, 20 How., 366 (BILLS AND NOTES, §§ 420-425). The bonds in question were dated January 1, 1851, and were redeemable after the 31st of December, 1864. In strictness, it is true they were not payable on the day when they became redeemable; but the known usage of the United States to pay all bonds as soon as the right of payment accrues, except where a distinction between redeemability and payability is made by law, and shown on the face of the bonds, requires the application of the rule respecting overdue obligations to bonds of the United States which have become redeemable, and in respect to which no such distinction has been made. Now, all the bonds in controversy had become redeemable before the date of the contract with White and Chiles; and all bonds of the same issue which have the indorsement of a governor of Texas made before the date of the secession ordinance — and there were no others indorsed by any governor — had been paid in coin on presentation at the treasury department; while, on the contrary, application for the payment of bonds without the required indorsement, and of coupons detached from such bonds, made to that department, had been denied. As a necessary consequence, the negotiation of these bonds became difficult. They sold much below the rates they would have commanded had the title to them been unquestioned. They were bought, in fact, and under the circumstances could only have been bought, upon speculation. The purchasers took the risk of a bad title, hoping, doubtless, that through the action of the national government, or of the government of Texas, it might be converted into a good one.

§ 160. *No act of the federal government in dispensing with the requirement of the bonds could prejudice the rights of the state.*

And it is true that the first provisional governor of Texas encouraged the expectation that these bonds would be ultimately paid to the holders. But he

was not authorized to make any engagement in behalf of the state, and in fact made none. It is true, also, that the treasury department, influenced perhaps by these representations, departed to some extent from its original rule, and paid bonds held by some of the defendants without the required indorsement. But it is clear that this change in the action of the department could not affect the rights of Texas as a state of the Union, having a government acknowledging her obligations to the national constitution. It is impossible, upon this evidence, to hold the defendants protected by absence of notice of the want of title in White and Chiles. As these persons acquired no right to payment of these bonds as against the state, purchasers could acquire none through them.

On the whole case, therefore, our conclusion is that the state of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

MR. JUSTICE GRIER dissented, holding (1) that, politically, Texas was not a state in the Union, and that she had no right to maintain the suit; (2) that she had no right to repudiate debts not contracted in aid of rebellion, and that whether a state *de facto* or *de jure*, during the four years she claimed to have been out of the Union, she was estopped from denying her identity in disputes with her own citizens. JUSTICES MILLER and SWAYNE concurred with JUSTICE GRIER as to the incapacity of Texas to maintain the suit, but agreed with the majority on the merits.

HOUSTON *v.* MOORE.

(5 Wheaton, 1-76. 1820.)

ERROR to the Supreme Court of Pennsylvania.

STATEMENT OF FACTS.—An act of the state of Pennsylvania, of March 28, 1814, provided that non-commissioned officers and privates of the militia, who failed to respond to the requisitions of the president, should be subject to the penalties prescribed by acts of congress then in force, or such penalties as might be prescribed thereafter. The act provided for trial by court-martial. Houston was tried and fined under this law, and brought an action of trespass against the officer who levied on his property to satisfy the fine. The court charged that the law was constitutional.

Opinion by MR. JUSTICE WASHINGTON.

There is but one question in this cause, and it is, whether the act of the legislature of Pennsylvania, under the authority of which the plaintiff in error was tried, and sentenced to pay a fine, is repugnant to the constitution of the United States, or not? But before this question can be clearly understood, it will be necessary to inquire, 1. What are the powers granted to the general government, by the constitution of the United States, over the militia; and 2. To what extent they have been assumed and exercised?

§ 161. *Powers granted to the general government by the constitution over the militia.*

1. The constitution declares that congress shall have power to provide for calling forth the militia in three specified cases: for organizing, arming and disciplining them; and for governing such part of them as may be employed in the service of the United States; reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress. It is further provided that the president of the United States shall be commander of the militia, when called into the actual service of the United States. 2. After the constitution went into

operation, congress proceeded, by many successive acts, to exercise these powers, and to provide for all the cases contemplated by the constitution.

§ 162. *Calling out the militia.*

The act of the 2d of May, 1792 (1 Stats. at Large, 259), which is re-enacted almost *verbatim* by that of the 28th of February, 1795, authorizes the president of the United States, in case of invasion, or of imminent danger of it, or when it may be necessary for executing the laws of the United States, or to suppress insurrections, to call forth such number of the militia of the states most convenient to the scene of action, as he may judge necessary, and to issue his orders for that purpose to such officer of the militia as he shall think proper. It prescribes the amount of pay and allowances of the militia so called forth, and employed in the service of the United States, and subjects them to the rules and articles of war applicable to the regular troops. It then proceeds to prescribe the punishment to be inflicted upon delinquents, and the tribunal which is to try them, by declaring that every officer or private who should fail to obey the orders of the president in any of the cases before recited should be liable to pay a certain fine, to be determined and adjusted by a court-martial, and to be imprisoned by a like sentence, on failure of payment. The courts-martial for the trial of militia are to be composed of militia officers only, and the fines to be certified by the presiding officer of the court to the marshal of the district, and to be levied by him, and, also, to the supervisor, to whom the fines are to be paid over.

§ 163. *Courts-martial, how composed. Act of April 18, 1814.*

The act of the 18th of April, 1814 (3 id., 134), provides that courts-martial, to be composed of militia officers only, for the trial of militia, drafted, detached and called forth for the service of the United States, whether acting in conjunction with the regular forces or otherwise, shall, whenever necessary, be appointed, held and conducted in the manner prescribed by the rules and articles of war for appointing, holding and conducting courts-martial for the trial of delinquents in the army of the United States. Where the punishment prescribed is by stoppage of pay or imposing a fine, limited by the amount of pay, the same is to have relation to the monthly pay existing at the time the offense was committed. The residue of the act is employed in prescribing the manner of conducting the trial; the rules of evidence for the government of the court; the time of service and other matters not so material to the present inquiry.

§ 164. *Act of May 8, 1792, for establishing a uniform militia.*

The only remaining act of congress which it will be necessary to notice in this general summary of the laws is that of the 8th of May, 1792 (1 id., 271), for establishing a uniform militia in the United States. It declares who shall be subject to be enrolled in the militia and who shall be exempt; what arms and accoutrements the officers and privates shall provide themselves with; arranges them into divisions, brigades, regiments, battalions, and companies, in such manner as the state legislatures may direct; declares the rules of discipline by which the militia is to be governed, and makes provision for such as should be disabled whilst in the actual service of the United States. The pay and subsistence of the militia, whilst in service, are provided for by other acts of congress, and particularly by one passed on the 3d (2d?) of January, 1795. 1 Stats. at Large, 408. The laws which I have referred to amount to a full execution of the powers conferred upon congress by the constitution. They provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasion. They also provide for organizing, arming

and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; leaving to the states, respectively, the appointment of the officers, and the authority of training them according to the discipline prescribed by congress. This system may not be formed with as much wisdom as, in the opinion of some, it might have been, or as time and experience may hereafter suggest. But, to my apprehension, the whole ground of congressional legislation is covered by the laws referred to. The manner in which the militia is to be organized, armed, disciplined and governed is fully prescribed; provisions are made for drafting, detaching and calling forth the state quotas, when required by the president. The president's orders may be given to the chief executive magistrate of the state, or to any militia officer he may think proper; neglect or refusal to obey orders is declared to be an offense against the laws of the United States, and subjects the offender to trial, sentence and punishment, to be adjudged by a court-martial, to be summoned in the way pointed out by the articles and rules of war; and the mode of proceeding to be observed by these courts is detailed with all necessary perspicuity. If I am not mistaken in this view of the subject, the way is now open for the examination of the great question in the cause. Is it competent to a court-martial, deriving its jurisdiction under state authority, to try and to punish militia-men, drafted, detached and called forth by the president into the service of the United States, who have refused or neglected to obey the call?

§ 165. *The militia; powers of state and federal governments.*

In support of the judgment of the court below, I understand the leading arguments to be the two following: 1. That militia-men, when called into the service of the United States by the president's orders, communicated either to the executive magistrate or to any inferior militia officer of a state, are not to be considered as being in the service of the United States until they are mustered at the place of rendezvous. If this be so, then, 2. The state retains a right, concurrent with the government of the United States, to punish his delinquency. It is admitted on the one side, that so long as the militia are acting under the military jurisdiction of the state to which they belong, the powers of legislation over them are concurrent in the general and state governments. Congress has power to provide for organizing, arming and disciplining them; and this power being unlimited, except in the two particulars of officering and training them, according to the discipline to be prescribed by congress, it may be exercised to any extent that may be deemed necessary by congress. But as state militia, the power of the state governments to legislate on the same subjects, having existed prior to the formation of the constitution, and not having been prohibited by that instrument, it remains with the states, subordinate, nevertheless, to the paramount law of the general government, operating upon the same subject. On the other side, it is conceded, that after a detachment of the militia have been called forth, and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. Over the national militia the state governments never had or could have jurisdiction. None such is conferred by the constitution of the United States; consequently, none such can exist. The first question then is, at what time, and under what circumstances, does a portion of militia, drafted, detached and called forth by the president, enter into the service of the United States, and change their character from state to national militia? That congress might, by law, have fixed the



period by confining it to the draft; the order given to the chief magistrate or other militia officer of the state; to the arrival of the men at the place of rendezvous, or to any other circumstance, I can entertain no doubt. This would certainly be included in the more extensive powers of calling forth the militia, organizing, arming, disciplining and governing them. But has congress made any declaration on this subject, and in what manner is the will of that body, as expressed in the beforementioned laws, to be construed? It must be conceded that there is no law of the United States which declares, in express terms, that the organizing, arming and equipping a detachment, on the order of the president to the state militia officers or to the militia-men personally, places them in the service of the United States. It is true that the refusal or neglect of the militia to obey the orders of the president is declared to be an offense against the United States, and subjects the offender to a certain prescribed punishment. But this flows from the power bestowed upon the general government to call them forth; and, consequently, to punish disobedience to a legal order; and by no means proves that the call of the president places the detachment in the service of the United States. But although congress has been less explicit on this subject than they might have been, and it could be wished they had been, I am, nevertheless, of opinion that a fair construction of the different militia laws of the United States will lead to a conclusion that something more than organizing and equipping a detachment, and ordering it into service, was considered as necessary to place the militia in the service of the United States. That preparing a detachment for such service does not place it in the service is clearly to be collected from the various temporary laws which have been passed, authorizing the president to require of the state executives to organize, arm and equip their state quotas of militia for the service of the United States. Because they all provide that the requisition shall be to hold such quotas in readiness to march at a moment's warning; and some, if not all, of them authorize the president to call into actual service any part or the whole of said quotas or detachments; clearly distinguishing between the orders of the president to organize and hold the detachments in readiness for service and their entering into service.

The act of the 28th of February, 1795, declares that the militia employed in the service of the United States shall receive the same pay and allowance as the troops of the United States, and shall be subject to the same rules and articles of war. The provisions made for disabled militia-men, and for their families in case of their death, are by other laws confined to such militia as are, or have been, in actual service. There are other laws which seem very strongly to indicate the time at which they are considered as being in service. Thus, the act of the 28th of February, 1795, declares that a militia-man called into the service of the United States shall not be compelled to serve more than three months after his arrival at the place of rendezvous, in any one year. The eighth section of the act of the 18th of April, 1814, declares that the militia, when called into the service of the United States, if, in the president's opinion, the public interest requires it, may be compelled to serve for a term not exceeding six months after their arrival at the place of rendezvous, in any one year; and by the tenth section, provision is made for the expenses which may be incurred by marching the militia to their places of rendezvous, in pursuance of a requisition of the president, and they are to be adjusted and paid in like manner as those incurred after their arrival at the rendezvous. The third

section of the act of the 2d of January, 1795, provides that whenever the militia shall be called into the actual service of the United States, their pay shall be deemed to commence from the day of their appearing at the place of battalion, regimental or brigade rendezvous, allowing a day's pay and ration for every fifteen miles from their homes to said rendezvous.

§ 166. *Actual service the criterion of national militia.*

From this brief summary of the laws, it would seem that actual service was considered by congress as the criterion of national militia; and that the service did not commence until the arrival of the militia at the place of rendezvous. That is, the *terminus a quo*, the service, the pay, and subjection to the articles of war, are to commence and continue. If the service, in particular, is to continue for a certain length of time from a certain day, it would seem to follow, almost conclusively, that the service commenced on that, and not on some prior, day. And, indeed, it would seem to border somewhat upon an absurdity, to say that a militia-man was in the service of the United States at any time, who, so far from entering into it for a single moment, had refused to do so, and who never did any act to connect him with such service. It has already been admitted, that if congress had pleased so to declare, a militia-man, called into the service of the United States, might have been held and considered as being constructively in that service, though not actually so; and might have been treated in like manner as if he had appeared at the place of rendezvous. But congress has not so declared, nor have they made any provision applicable to such a case; on the contrary, it would appear that a fine to be paid by the delinquent militia-man was deemed an equivalent for his services, and an atonement for his disobedience.

§ 167. *Militia are subject to the laws of the state in which they are enrolled, except where those laws are controlled by acts of congress.*

If, then, a militia-man called into the service of the United States shall refuse to obey the order, and is, consequently, not to be considered as in the service of the United States, or removed from the military jurisdiction of the state to which he belongs, the next question is, is it competent to the state to provide for trying and punishing him for his disobedience, by a court-martial, deriving its authority under the state? It may be admitted at once that the militia belong to the states, respectively, in which they are enrolled, and that they are subject, both in their civil and military capacities, to the jurisdiction and laws of such state, except so far as those laws are controlled by acts of congress constitutionally made.

§ 168. *Where the states and the United States have concurrent powers of legislation, the states can only legislate upon subjects upon which congress has not acted.*

Congress has power to provide for organizing, arming and disciplining the militia; and it is presumable that the framers of the constitution contemplated a full exercise of all these powers. Nevertheless, if congress had declined to exercise them, it was competent to the state governments to provide for organizing, arming and disciplining their respective militia in such manner as they might think proper. But congress has provided for all these subjects in the way which that body must have supposed the best calculated to promote the general welfare, and to provide for the national defense. After this, can the state governments enter upon the same ground — provide for the same objects as they may think proper, and punish in their own way violations of the laws

they have so enacted? The affirmative of this question is asserted by the defendant's counsel, who, it is understood, contend that, unless such state laws are in direct contradiction to those of the United States, they are not repugnant to the constitution of the United States. From this doctrine I must, for one, be permitted to dissent. The two laws may not be in such absolute opposition to each other as to render the one incapable of execution without violating the injunctions of the other, and yet the will of the one legislature may be in direct collision with that of the other. This will is to be discovered as well by what the legislature has not declared as by what they have expressed. Congress, for example, has declared that the punishment for disobedience of the act of congress shall be a certain fine; if that provided by the state legislature for the same offense be a similar fine with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But surely the will of congress is, nevertheless, thwarted and opposed.

This question does not so much involve a contest for power between the two governments as the rights and privileges of the citizen, secured to him by the constitution of the United States, the benefit of which he may lawfully claim. If, in a specified case, the people have thought proper to bestow certain powers on congress as the safest depository of them, and congress has legislated within the scope of them, the people have reason to complain that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can at the same time be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other so far as they do differ. If the one imposes a certain punishment for a certain offense, the presumption is that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together.

I admit that a legislative body may, by different laws, impose upon the same person, for the same offense, different and cumulative punishments; but then it is the will of the same body to do so, and the second, equally with the first law, is the will of that body. There is, therefore, and can be, no opposition of wills. But the case is altogether different where the laws flow from the wills of distinct co-ordinate bodies. This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which congress has acted, provided the two laws are not in terms or in their operation contradictory and repugnant to each other. Upon the subject of the militia, congress has exercised the powers conferred on that body by the constitution as fully as was thought right, and has thus excluded the power of legislation by the states on these subjects, except so far as it has been permitted by congress; although it should be conceded that important provisions have been omitted, or that others which have been made might have been more extended or more wisely devised.

§ 169. *Whether a state court-martial has jurisdiction to enforce the laws of the United States.*

There still remains another question to be considered which more immediately involves the merits of this cause. Admit that the legislature of Pennsylvania could not constitutionally legislate in respect to delinquent militia-men and to prescribe the punishment to which they should be subject, had the state court-martial jurisdiction over the subject so as to enforce the laws of congress against these delinquents? This, it will be seen, is a different question from that which has been just examined. That respects the power of a state legislature to legislate upon a subject on which congress has declared its will. This concerns the jurisdiction of a state military tribunal to adjudicate in a case which depends on a law of congress, and to enforce it. It has been already shown that congress has prescribed the punishment to be inflicted on a militia-man detached and called forth, but who has refused to march; and has also provided that courts-martial for the trial of such delinquents, to be composed of militia officers only, shall be held and conducted in the manner pointed out by the rules and articles of war. That congress might have vested the exclusive jurisdiction in courts-martial to be held and conducted as the laws of the United States have prescribed, will, I presume, hardly be questioned. The offense to be punished grows out of the constitution and laws of the United States, and is, therefore, clearly a case which might have been withdrawn from the concurrent jurisdiction of the state tribunals. But an exclusive jurisdiction is not given to courts-martial, deriving their authority under the national government, by express words. The question then (and I admit the difficulty of it) occurs, is this a case in which the state courts-martial could exercise jurisdiction?

§ 170. — *the jurisdiction of federal courts is not exclusive except where expressly made so.*

Speaking upon the subject of the federal judiciary, the Federalist distinctly asserts the doctrine that the United States, in the course of legislation upon the objects intrusted to their direction, may commit the decision of causes arising upon a particular regulation to the federal courts solely, if it should be deemed expedient; yet that, in every case in which the state tribunals should not be expressly excluded by the acts of the national legislature, they would, of course, take cognizance of the causes to which those acts might give birth. Letters of Publius, or the Federalist, No. 82. I can discover, I confess, nothing unreasonable in this doctrine, nor can I perceive any inconvenience which can grow out of it, so long as the power of congress to withdraw the whole, or any part, of those cases from the jurisdiction of the state courts, is, as I think it must be, admitted. The practice of the general government seems strongly to confirm this doctrine; for at the first session of congress which commenced after the adoption of the constitution, the judicial system was formed; and the exclusive and concurrent jurisdiction conferred upon the courts created by that law, were clearly distinguished and marked; showing that, in the opinion of that body, it was not sufficient to vest an exclusive jurisdiction, where it was deemed proper, merely by a grant of jurisdiction generally. In particular, this law grants exclusive jurisdiction to the circuit courts of all crimes and offenses cognizable under the authority of the United States, except where the laws of the United States should otherwise provide; and this will account for the proviso in the act of the 24th of February, 1807, ch. 75 (2 Stats. at Large, 423), concerning the forgery of the notes of the Bank of the United States, "that

nothing in that act contained should be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states over offenses made punishable by that act." A similar proviso is to be found in the act of the 21st of April, 1806, ch. 49 (id., 404), concerning the counterfeiters of the current coin of the United States. It is clear that, in the opinion of congress, this saving was necessary in order to authorize the exercise of concurrent jurisdiction by the state courts over those offenses; and there can be very little doubt but that this opinion was well founded. The judiciary act had vested in the federal courts exclusive jurisdiction of all offenses cognizable under the authority of the United States, unless where the laws of the United States should otherwise direct. The states could not, therefore, exercise a concurrent jurisdiction in those cases, without coming into direct collision with the laws of congress. But by these savings, congress did provide that the jurisdiction of the federal courts in the specified cases should not be exclusive; and the concurrent jurisdiction of the state courts was instantly restored, so far as, under state authority, it could be exercised by them.

§ 171. — *congress cannot confer jurisdiction upon state courts.*

There are many other acts of congress which permit jurisdiction over the offenses therein described to be exercised by state magistrates and courts; not, I presume, because such permission was considered to be necessary under the constitution, in order to vest a concurrent jurisdiction in those tribunals, but because, without it, the jurisdiction was exclusively vested in the national courts by the judiciary act, and consequently could not be otherwise exercised by the state courts. For I hold it to be perfectly clear, that congress cannot confer jurisdiction upon any courts but such as exist under the constitution and laws of the United States, although the state courts may exercise jurisdiction on cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts.

§ 172. — *states may pass laws conferring upon their courts authority to enforce the laws of the United States.*

What, then, is the real object of the law of Pennsylvania which we are considering? I answer, to confer authority upon a state court-martial to enforce the laws of the United States against delinquent militia-men, who had disobeyed the call of the president to enter into the service of the United States; for, except the provisions for vesting this jurisdiction in such a court, this act is, in substance, a re-enactment of the acts of congress, as to the description of the offense, the nature and extent of the punishment, and the collection and appropriation of the fines imposed. Why might not this court-martial exercise the authority thus vested in it by this law? As to crimes and offenses against the United States, the law of congress had vested the cognizance of them exclusively in the federal courts. The state courts, therefore, could exercise no jurisdiction whatever over such offenses, unless where, in particular cases, other laws of the United States had otherwise provided; and wherever such provision was made, the claim of exclusive jurisdiction to the particular cases was withdrawn by the United States, and the concurrent jurisdiction of the state courts was *eo instanti* restored, not by way of grant from the national government, but by the removal of a disability before imposed upon the state tribunals.

§ 173. *Circuit and district courts no jurisdiction over military offenses.*

But military offenses are not included in the act of congress conferring jurisdiction upon the circuit and district courts; no person has ever contended that such offenses are cognizable before the common law courts. The militia laws

have, therefore, provided that the offense of disobedience to the president's call upon the militia shall be cognizable by a court-martial of the United States; but an exclusive cognizance is not conferred upon that court, as it had been upon the common law courts as to other offenses, by the judiciary act. It follows, then, as I conceive, that jurisdiction over this offense remains to be concurrently exercised by the national and state courts-martial, since it is authorized by the laws of the state, and not prohibited by those of the United States. Where is the repugnance of the one law to the other? The jurisdiction was clearly concurrent over militia-men not engaged in the service of the United States; and the acts of congress have not disturbed this state of things, by asserting an exclusive jurisdiction. They certainly have not done so in terms; and I do not think that it can be made out by any fair construction of them. The act of 1795 merely declares that this offense shall be tried by a court-martial. This was clearly not exclusive; but, on the contrary, it would seem to import that such court might be held under national or state authority. The act of 1814 does not render the jurisdiction necessarily exclusive. It provides that courts-martial for the trial of militia, drafted and called forth, shall, when necessary, be appointed, held and conducted in the manner prescribed by the rules of war. If the mere assignment of jurisdiction to a particular court does not necessarily render it exclusive, as I have already endeavored to prove, then it would follow that this law can have no such effect; unless, indeed, there is a difference in this respect between the same language, when applied to military and to civil courts; and if there be a difference, I have not been able to perceive it. But the law uses the expression "when necessary." How is this to be understood? It may mean, I acknowledge, whenever there are delinquents to try; but, surely, if it import no more than this, it was very unnecessarily used, since it would have been sufficient to say that courts-martial for the trial of militia called into service should be formed and conducted in the manner prescribed by the law. The act of 1795 had declared who were liable to be tried, but had not said with precision before what court the trial should be had. This act describes the court; and the two laws being construed together, would seem to mean that every such delinquent as is described in the act of 1795 should pay a certain fine, to be determined and adjudged by a court-martial, to be composed of militia officers, to be appointed and conducted in the manner prescribed by the articles of war. These words, when necessary, have no definite meaning, if they are confined to the existence of cases for trial before the court. But if they be construed (as I think they ought to be) to apply to trials rendered necessary by the omission of the states to provide for state courts-martial to exercise a jurisdiction in the case, or of such courts to take cognizance of them, when so authorized, they have an important and useful meaning. If the state court-martial proceeds to take cognizance of the cases, it may not appear necessary to the proper officer in the service of the United States to summon a court to try the same cases; if they do not, or for want of authority cannot try them, then it may be deemed necessary to convene a court-martial under the articles of war, to take and to exercise the jurisdiction.

§ 174. *Where two courts have concurrent jurisdiction, the sentence of either may be pleaded in bar in the other.*

There are two objections which were made by the plaintiff's counsel to the exercise of jurisdiction in this case, by the state court-martial, which remain to be noticed. 1. It was contended that if the exercise of this jurisdiction be

admitted, that the sentence of the court would either oust the jurisdiction of the United States' court-martial, or might subject the accused to be twice tried for the same offense. To this I answer, that if the jurisdiction of the two courts be concurrent, the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other, as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, instituted in a circuit court of the United States. Another objection is, that if the state court-martial had authority to try these men, the governor of that state, in case of conviction, might have pardoned them. I am by no means satisfied that he could have done so; but if he could, this would only furnish a reason why congress should vest the jurisdiction in these cases exclusively in a court-martial acting under the authority of the United States.

§ 175. *The Pennsylvania courts-martial and the federal courts-martial have concurrent jurisdiction to try militia-men for disobeying the president's call.*

Upon the whole, I am of opinion, after the most laborious examination of this delicate question, that the state court-martial had a concurrent jurisdiction with the tribunal pointed out by the acts of congress to try a militia-man who had disobeyed the call of the president, and to enforce the laws of congress against such delinquent; and that this authority will remain to be so exercised until it shall please congress to vest it exclusively elsewhere, or until the state of Pennsylvania shall withdraw from their court-martial the authority to take such jurisdiction. At all events, this is not one of those clear cases of repugnance to the constitution of the United States where I should feel myself at liberty to declare the law to be unconstitutional; the sentence of the court *coram non judice*; and the judgment of the supreme court of Pennsylvania erroneous on these grounds.

Two of the judges are of opinion that the law in question is unconstitutional, and that the judgment below ought to be reversed. The other judges are of opinion that the judgment ought to be affirmed; but they do not concur, in all respects, in the reasons which influence my opinion.

Dissenting opinion by MR. JUSTICE STORY.

The only question which is cognizable by this court, upon this voluminous record, arises from a very short paragraph in the close of the bill of exceptions. It there appears that the plaintiff prayed the state court of common pleas to instruct the jury that the first, second and third paragraphs of the twenty-first section of the statute of Pennsylvania of the 28th of March, 1814, "so far as they related to the militia called into the service of the United States under the laws of congress, and who failed to obey the orders of the president of the United States, are contrary to the constitution of the United States, and the laws of congress made in pursuance thereof, and are, therefore, null and void." The court instructed the jury that these paragraphs were not contrary to the constitution or laws of the United States, and were, therefore, not null and void. This opinion has been affirmed by the highest state tribunal of Pennsylvania, and judgment has been there pronounced, in pursuance of it, in favor of the defendant. The cause stands before us upon a writ of error from this last judgment; and the naked question for us to decide is, whether the paragraphs alluded to are repugnant to the constitution or laws of the United States; if so, the judgment must be reversed; if otherwise, it ought to be affirmed. Questions of this nature are always of great importance and delicacy. They

involve interests of so much magnitude, and of such deep and permanent public concern, that they cannot but be approached with uncommon anxiety. The sovereignty of a state in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the constitution; and, on the other hand, we are bound to support that constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains.

§ 176. *When powers granted to congress are exclusive of similar powers in state governments.*

The constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to congress does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar power existing in the states, unless where the constitution has expressly, in terms, given an exclusive power to congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states. The example of the first class is to be found in the exclusive legislation delegated to congress over places purchased by the consent of the legislature of the state in which the same shall be, for forts, arsenals, dock-yards, etc.; of the second class, the prohibition of a state to coin money or emit bills of credit; of the third class, as this court have already held, the power to establish an uniform rule of naturalization (*Chirac v. Chirac*, 2 Wheat., 259, 269); and the delegation of admiralty and maritime jurisdiction. *Martin v. Hunter*, 1 Wheat., 304, 337; and see *The Federalist*, No. 32. In all other cases not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with congress, not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principles of general reasoning.

§ 177. *In cases of concurrent authority, state laws must yield if they conflict with federal laws.*

There is this reserve, however, that in cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision on the same subject, those of the Union being "the supreme law of the land," are of paramount authority, and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield.

Such are the general principles by which my judgment is guided in every investigation on constitutional points. I do not know that they have ever been seriously doubted. They commend themselves by their intrinsic equity, and have been amply justified by the opinions of the great men under whose guidance the constitution was framed, as well as by the practice of the government of the Union. To desert them would be to deliver ourselves over to endless doubts and difficulties; and probably to hazard the existence of the constitution itself. With these principles in view, let the question now before the court be examined.



§ 178. *Powers of congress over militia limited to objects specified in the constitution. State laws control in other respects.*

The constitution declares that congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" and "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress." It is almost too plain for argument that the power here given to congress over the militia is of a limited nature, and confined to the objects specified in these clauses; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the state authorities. Nor can the reservation to the states of the appointment of the officers and authority of the training the militia according to the discipline prescribed by congress, be justly considered as weakening this conclusion. That reservation constitutes an exception, merely from the power given to congress "to provide for organizing, arming and disciplining the militia;" and is a limitation upon the authority, which would otherwise have devolved upon it, as to the appointment of officers. But the exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the states over the militia. What those powers are must depend upon their own constitutions; and what is not taken away by the constitution of the United States must be considered as retained by the states or the people. The exception, then, ascertains only that congress have not, and that the states have, the power to appoint the officers of the militia, and to train them according to the discipline prescribed by congress. Nor does it seem necessary to contend that the power "to provide for organizing, arming and disciplining the militia," is exclusively vested in congress. It is merely an affirmative power, and if not in its own nature incompatible with the existence of a like power in the states, it may well leave a concurrent power in the latter. But when once congress has carried this power into effect, its laws for the organization, arming and discipline of the militia are the supreme law of the land; and all interfering state regulations must necessarily be suspended in their operation. It would certainly seem reasonable that, in the absence of all interfering provisions by congress on the subject, the states should have authority to organize, arm and discipline their own militia. The general authority retained by them over the militia would seem to draw after it these, as necessary incidents. If congress should not have exercised its own power, how, upon any other construction than that of a concurrent power, could the states sufficiently provide for their own safety against domestic insurrections, or the sudden invasion of a foreign enemy? They are expressly prohibited from keeping troops or ships of war in time of peace; and this, undoubtedly, upon the supposition that in such cases the militia would be their natural and sufficient defense. Yet what would the militia be without organization, arms and discipline? It is certainly not compulsory upon congress to exercise its own authority upon this subject. The time, the mode and the extent, must rest upon its means and sound discretion. If, therefore, the present case turned upon the question whether a state might organize, arm and discipline its own militia, in the absence of, or subordinate to, the regulations of congress, I am certainly not prepared to deny the legitimacy of such an exercise of authority. It does not seem repugnant in its nature to the grant of

a like paramount authority to congress; and if not, then it is retained by the states. The fifth amendment to the constitution, declaring that "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed," may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns, the reasoning already suggested.

§ 179. *Power of congress to provide for governing militia in the service of the United States, exclusive.*

But congress have, also, the power to provide "for governing such part of the militia as may be employed in the service of the United States." It has not been attempted, in argument, to establish that this power is not exclusively in congress; or that the states have a concurrent power of governing their own militia when in the service of the Union. On the contrary, the reverse has been conceded, both here and before the other tribunals in which this cause has been so ably and learnedly discussed. And there certainly are the strongest reasons for this construction. When the militia is called into the actual service of the United States, by which I understand actual employment in service, the constitution declares that the president shall be the commander-in-chief. The militia of several states may, at the same time, be called out for the public defense; and to suppose each state could have an authority to govern its own militia in such cases, even subordinate to the regulations of congress, seems utterly inconsistent with that unity of command and action on which the success of all military operations must essentially depend. There never could be a stronger case put from the argument of public inconvenience, against the adoption of such a doctrine. It is scarcely possible that any interference, however small, of a state, under such circumstances, in the government of the militia, would not materially embarrass, and directly, or indirectly, impugn the authority of the Union. In most cases there would be an utter repugnancy. It would seem, therefore, that a rational interpretation must construe this power as exclusive in its own nature, and belonging solely to congress.

§ 180. *Power of congress to provide for calling forth militia, not exclusive.*

The remaining clause gives congress power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." Does this clause vest in congress an exclusive power, or leave to the states a concurrent power to enact laws for the same purposes? This is an important question, bearing directly on the case before us, and deserves serious deliberation. The plaintiff contends that the power is exclusive in congress; the defendant, that it is not. In considering this question, it is always to be kept in view that the case is not of a new power granted to congress, where no similar power already existed in the states. On the contrary, the states, in virtue of their sovereignty, possessed general authority over their own militia; and the constitution carved out of that a specific power in certain enumerated cases. But the grant of such a power is not necessarily exclusive, unless the retaining of a concurrent power by the states be clearly repugnant to the grant. It does not strike me that there is any repugnancy in such concurrent power in the states. Why may not a state call forth its own militia in aid of the United States, to execute the laws of the Union, or suppress insurrections, or repel invasions? It would certainly seem fit that a state might so do, where the insurrection or invasion is within its own territory, and directed against its own existence or authority; and yet these are cases to which the power of congress pointedly applies. And the execution of the laws of the

Union within its territory may not be less vital to its rights and authority than the suppression of a rebellion, or the repulse of an enemy. I do not say that a state may call forth, or claim under its own command, that portion of its militia which the United States have already called forth, and hold employed in actual service. There would be a repugnancy in the exercise of such an authority under such circumstances. But why may it not call forth and employ the rest of its militia in aid of the United States, for the constitutional purposes? It could not clash with the exercise of the authority confided to congress; and yet that it must necessarily clash with it in all cases, is the sole ground upon which the authority of congress can be deemed exclusive. I am not prepared to assert that a concurrent power is not retained by the states to provide for the calling forth their own militia as auxiliary to the power of congress in the enumerated cases. The argument of the plaintiff is, that when a power is granted to congress to legislate in specific cases, for purposes growing out of the Union, the natural conclusion is, that the power is designed to be exclusive; that the power is to be exercised for the good of the whole, by the will of the whole, and consistent with the interests of the whole; and that these objects can nowhere be so clearly seen or so thoroughly weighed as in congress, where the whole nation is represented. But the argument proves too much; and pursued to its full extent, it would establish that all the powers granted to congress are exclusive, unless where concurrent authority is expressly reserved to the states. But assuming the states to possess a concurrent power on this subject, still, the principal difficulty remains to be considered. It is conceded on all sides, and is, indeed, beyond all reasonable doubt, that all state laws on this subject are subordinate to those constitutionally enacted by congress, and that if there be any conflict or repugnancy between them, the state laws, to that extent, are inoperative and void. And this brings us to a consideration of the actual legislation of congress, and of Pennsylvania, as to the point in controversy.

§ 181. *Laws which congress may pass in the execution of its power to provide for calling forth the militia.*

In the execution of the power to provide for the calling forth of the militia, it cannot well be denied that congress may pass laws to make its call effectual, to punish disobedience to its call, to erect tribunals for the trial of offenders, and to direct the modes of proceeding to enforce the penalties attached to such disobedience. In its very essence, too, the offense created by such laws must be an offense exclusively against the United States, since it grows solely out of the breach of duties due to the United States, in virtue of its positive legislation. To deny the authority of congress to legislate to this extent, would be to deny that it had authority to make all laws necessary and proper to carry a given power into execution; to require the end, and yet deny the only means adequate to attain that end. Such a construction of the constitution is wholly inadmissible. The authority of congress being then unquestionable, let us see to what extent and in what manner it has been exercised. By the act of the 28th of February, 1795, c. 101, congress have provided for the calling forth of the militia in the cases enumerated in the constitution. The first section provides "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation, or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state or states, most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders

for that purpose to such officer or officers of the militia as he shall think proper." It then proceeds to make a provision, substantially the same, in cases of domestic insurrections; and, in like manner, the second section proceeds to provide for cases where the execution of the laws is opposed or obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings. The fourth section provides that "the militia employed in the service of the United States shall be subject to the same rules and articles of war as the troops of the United States." The fifth section (which is very material to our present purpose) provides "that every officer, non-commissioned officer or private of the militia who shall fail to obey any of the orders of the president of the United States, in the cases before recited, shall forfeit a sum not exceeding one year's pay and not less than one month's pay, to be determined and adjudged by a court-martial; and such officer shall, moreover, be liable to be cashiered by a sentence of a court-martial, and be incapacitated from holding a commission in the militia for a term not exceeding twelve months, at the discretion of the said court; and such non-commissioned officers and privates shall be liable to be imprisoned by a like sentence, on failure of payment of the fines adjudged against them, for one calendar month for every five dollars of such fine." The sixth section declares "that courts-martial for the trial of militia shall be composed of militia officers only." The seventh and eighth sections provide for the collection of the fines, by the marshal and deputies, and for the payment of them, when collected, into the treasury of the United States.

§ 182. *Act of Pennsylvania of March 28, 1814, providing a punishment for disobeying president's call.*

The second section of the militia act of Pennsylvania, passed the 28th of March, 1814, provides "that if any commissioned officer of the militia shall have neglected, or refused to serve, when called into actual service, in pursuance of any order or requisition of the president of the United States, he shall be liable to the penalties defined in the act of congress of the United States, passed on the 28th of February, 1795," and then proceeds to enumerate them; and then declares "that each and every non-commissioned officer and private, who shall have neglected or refused to serve when called into actual service, in pursuance of an order or requisition of the president of the United States, shall be liable to the penalties defined in the same act," and then proceeds to enumerate them. And to each clause is added, "or shall be liable to any penalty which may have been prescribed since the date of the passage of the said act, or which may hereafter be prescribed by any law of the United States." It then further provides that "within one month after the expiration of the time for which any detachment of militia shall have been called into the service of the United States, by, or in pursuance of, orders from the president of the United States, the proper brigade inspector shall summon a general, or a regimental court-martial, as the case may be, for the trial of such person or persons belonging to the detachment called out, who shall have refused or neglected to march therewith, or to furnish a sufficient substitute, or who, after having marched therewith, shall have returned without leave from his commanding officer, of which delinquents the proper brigade inspector shall furnish to the said court-martial an accurate list. And as soon as the said court-martial shall have decided in each of the cases which shall be submitted to their consideration, the president thereof shall furnish to the marshal of the United States, or to his deputy, and also to the comptroller of the treasury of the United States, a list of the delinquents fined, in order that the further proceedings

directed to be had thereon by the laws of the United States may be completed."

It is apparent, from this summary, that each of the acts in question has in view the same objects—the punishment of any persons belonging to the militia of the state, who shall be called forth into the service of the United States by the president, and refuse to perform their duty. Both inflict the same penalties for the same acts of disobedience. In the act of 1795, it is the failure "to obey the orders of the president, in any of the cases before recited;" and those orders are such as he is authorized to give by the first and second sections of the act, namely, to "call forth" the militia to execute the laws, to suppress insurrections and repel invasions. In the act of Pennsylvania, it is the neglect or refusal "to serve when called into actual service, in pursuance of any orders of the president," which orders can only be under the act of 1795. And to demonstrate this construction more fully, the delinquent is made liable to the penalties defined in the same act; and this again is followed by a clause varying the penalties, so as to conform to those which, from time to time, may be inflicted by the laws of the United States for the same offense. So that there can be no reasonable doubt that the legislature of Pennsylvania meant to punish, by its own courts-martial, an offense against the United States created by their laws by a substantial re-enactment of those laws in its own militia code.

§ 183. *The act of calling forth the militia does not place them in the federal service.*

No doubt has been here breathed of the constitutionality of the provisions of the act of 1795, and they are believed to be, in all respects, within the legitimate authority of congress. In the construction, however, of this act, the parties are at variance. The plaintiff contends that, from the time of the calling forth of the militia by the president, it is to be considered as *ipso facto* "employed in the service of the United States," within the meaning of the constitution and the act of 1795, and, therefore, to be exclusively governed by congress. On the other hand, the defendant contends that there is no distinction between the "calling forth," and the "employment in service," of the militia in the act of 1795, both meaning actual mustering in service, or an effectual calling into service; that the states retain complete authority over the militia, notwithstanding the call of the president, until it is obeyed by going into service; that the exclusive authority of the United States does not commence until the drafted troops are mustered and in the actual pay and service of the Union; and further, that the act of 1795 was never intended by its language to apply its penalties, except to militia in the latter predicament, leaving disobedience to the president's call to be punished by the states, as an offense against state authority.

Upon the most mature reflection, it is my opinion that there is a sound distinction between the "calling forth" of the militia, and their being in the "actual service" or "employment" of the United States, contemplated both in the constitution and acts of congress. The constitution, in the clause already adverted to, enables congress to provide for the government of such part of the militia "as may be employed in the service of the United States," and makes the president commander-in-chief of the militia "when called into the actual service of the United States." If the former clause included the authority in congress to call forth the militia, as being in virtue of the call of the president in actual service, there would certainly be no necessity for a distinct clause authorizing it to provide for the calling forth of the militia; and the

president would be commander-in-chief, not merely of the militia in actual service, but of the militia ordered into service. The acts of congress, also, aid the construction already asserted. The fourth section of the act of 1795 makes the militia "employed in the service of the United States" subject to the rules and articles of war; and these articles include capital punishments by courts-martial. Yet one of the amendments (art. 5) to the constitution prohibits such punishments "unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces," or in "the militia when in actual service in time of war or public danger." To prevent, therefore, a manifest breach of the constitution, we cannot but suppose that congress meant (what, indeed, its language clearly imports), in the fourth section, to provide only for cases of actual employment. The act of the 2d of January, 1795, c. 74, provides for the pay of the militia "when called into actual service," commencing it on the day of their appearance at the place of rendezvous, and allowing a certain pay for every fifteen miles' travel from their homes to that place. The ninety-seventh article of the rules and articles of war (Act of 10th of April, 1806, c. 20) (2 Stats. at Large, 359) declares that the officers and soldiers of any troops, whether militia or others, being mustered, and in the pay of the United States, shall at all times, and in all places "when joined, or acting in conjunction with the regular forces" of the United States, be governed by these articles, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers. And the act of the 18th of April, 1814 (c. 141), supplementary to that of 1795, provides for like courts-martial for the trial of militia, drafted, detached and called forth for the service of the United States, "whether acting in conjunction with the regular forces or otherwise." All these provisions for the government, payment and trial of the militia, manifestly contemplate that the militia are in actual employment and service, and not merely that they have been "called forth," or ordered forth, and had failed to obey the orders of the president. It would seem almost absurd to say that these men who have performed no actual service, are yet to receive pay; that they are "employed" when they refuse to be employed in the public service; that they are "acting" in conjunction with the regular forces or otherwise, when they are not embodied to act at all; or that they are subject to the rules and articles of war as troops organized and employed in the public service, when they have utterly disclaimed all military organization and obedience. In my judgment, there are the strongest reasons to believe that, by employment "in the service," or, as it is sometimes expressed, "in the actual service" of the United States, something more must be meant than a mere calling forth of the militia. That it includes some acts of organization, mustering or marching, done or recognized, in obedience to the call, in the public service. The act of 1795 is not, in its terms, compulsive upon any militia to serve; but contemplates an option in the person drafted to serve or not to serve, and if he pay the penalty inflicted by the law, he does not seem bound to perform any military duties.

Besides, the terms "call forth" and "employed in service" cannot, in any appropriate sense, be said to be synonymous. To suppose them used to signify the same thing, in the constitution and acts of congress, would be to defeat the obvious purposes of both. The constitution, in providing for the calling forth of the militia, necessarily supposes some act to be done before the actual employment of the militia; a requisition to perform service, a call to engage

in a public duty. From the very nature of things the call must precede the service; and to confound them is to break down the established meaning of language, and to render nugatory a power without which the militia can never be compelled to serve in defense of the Union. For of what constitutional validity can the act of 1795 be if the sense be not what I have stated? If congress cannot provide for a preliminary call, authorizing and requiring the service, how can it punish disobedience to that call? The argument that endeavors to establish such a proposition is utterly without any solid foundation. We do not sit here to fritter away the constitution upon metaphysical subtleties.

§ 184. *Act of 1795 does not confine its penalties to militia in the service of the United States; it applies to those called forth.*

Nor is it true that the act of 1795 confines its penalties to such of the militia as are in actual service, leaving those who refuse to comply with the orders of the president to the punishment that the state may choose to inflict for disobedience. On the contrary, if there be any certainty in language, the fifth section applies exclusively to those of the militia who are "called forth" by the president and fail to obey his orders, or, in other words, who refuse to go into the actual service of the United States. It inflicts no penalty in any other case, and it supposes, and justly, that all the cases of disobedience of the militia, while in actual service, were sufficiently provided for by the fourth section of the act, they being thereby subjected to the rules and articles of war. It inflicts the penalty, too, as we have already seen, in the identical cases, and none other, to which the paragraphs of the militia act of Pennsylvania, now in question, pointedly address themselves; and in the identical case for which the present plaintiff was tried, convicted and punished by the state court-martial. So that if the defendant's construction of the act of 1795 could prevail, it would not help his case. All the difficulties as to the repugnancy between the act of congress and of Pennsylvania would still remain, with the additional difficulty that the court would be driven to say that the mere act of calling forth put the militia, *ipso facto*, into actual service, and so placed them exclusively under the government of congress.

§ 185. *A United States statute referring to a court generally must be presumed to refer to a federal court.*

In the remarks which have already been made, the answer to another proposition stated by the defendant is necessarily included. The offense to which the penalties are annexed in the fourth section of the act of 1795 is not an offense against state authority but against the United States, created by a law of congress, in virtue of a constitutional authority, and punishable by a tribunal which it has selected and which it can change at its pleasure. That tribunal is a court-martial; and the defendant contends that, as no explanatory terms are added, a state court-martial is necessarily intended, because the laws of the Union have not effectually created any court-martial which, sitting under the authority of the United States, can in all cases try the offense. It will at once be seen that the act of 1795 has not expressly delegated cognizance of the offense to a state court-martial, and the question naturally arises, in what manner, then, can it be claimed? When a military offense is created by an act of congress, to be punished by a court-martial, how is such an act to be interpreted? If a similar clause were in a state law, we should be at no loss to give an immediate and definite construction to it, namely, that it pointed to a state court-martial, and why? Because the offense being created

by state legislation, to be executed for state purposes, must be supposed to contemplate in its execution such tribunals as the state may erect and control and confer jurisdiction upon. A state legislature cannot be presumed to legislate as to foreign tribunals, but must be supposed to speak in reference to those which may be reached by its own sovereignty. Precisely the same reasons must apply to the construction of a law of the United States. The object of the law being to provide for the exercise of a power vested in congress by the constitution, whatever is directed to be done must be supposed to be done, unless the contrary be expressed, under the authority of the Union. When, then, a court-martial is spoken of in general terms, in the act of 1795, the reasonable interpretation is that it is a court-martial to be organized under the authority of the United States, a court-martial whom congress may convene and regulate. There is no pretense to say that congress can compel a state court-martial to convene and sit in judgment on such offense. Such an authority is nowhere confided to it by the constitution. Its power is limited to the few cases already specified, and these, most assuredly, do not embrace it; for it is not an implied power necessary or proper to carry into effect the given powers. The nation may organize its own tribunals for this purpose; and it has no necessity to resort to other tribunals to enforce its rights. If it do not choose to organize such tribunals, it is its own fault; but it is not, therefore, imperative upon a state tribunal to volunteer in its service. The sixth section of the same act comes in aid of this most reasonable construction. It declares that courts-martial for the trial of militia shall be composed of militia officers only, which plainly shows that it supposed that regular troops and officers were in the same service; and yet, it is as plain that this provision would be superfluous, if state courts-martial were solely intended, since the states do not keep, and ordinarily have no authority to keep, regular troops, but are bound to confine themselves to militia. It might, with as much propriety, be contended that the courts-martial for the trial of militia, under the ninety-seventh article of the rules and articles of war, are to be state courts-martial. The language of that article, so far as respects this point, is almost the same with the clause now under consideration.

§ 186. *The fact that federal courts are not given jurisdiction over offenses against the United States does not give state courts jurisdiction.*

As to the argument itself, upon which the defendant erects his construction of this part of the act, its solidity is not admitted. It does not follow, because congress have neglected to provide adequate means to enforce their laws, that a resulting trust is reposed in the state tribunals to enforce them. If an offense be created of which no court of the United States has a vested cognizance, the state court may not, therefore, assume jurisdiction, and punish it. It cannot be pretended that the states have retained any power to enforce fines and penalties created by the laws of the United States, in virtue of their general sovereignty, for that sovereignty did not originally attach on such subjects. They sprung from the Union, and had no previous existence. It would be a strange anomaly in our national jurisprudence to hold the doctrine, that, because a new power created by the constitution of the United States was not exercised to its full extent, therefore the states might exercise it by a sort of process in aid. For instance, because congress decline "to borrow money on the credit of the United States," or "to constitute tribunals inferior to the supreme court," or "to make rules for the government and regulation of the land and naval forces," or exercise either of them defectively, that a state might step in,



and by its legislation supply those defects, or assume a general jurisdiction on these subjects. If, therefore, it be conceded that congress have not as yet legislated to the extent of organizing courts-martial for the trial of offenses created by the act of 1795, it is not conceded that therefore state courts-martial may, in virtue of state laws, exercise the authority, and punish offenders. Congress may hereafter supply such defects, and cure all inconveniences.

§ 187. *The criminal jurisdiction of the United States cannot be delegated to state tribunals.*

It is a general principle, too, in the policy, if not the customary law, of nations, that no nation is bound to enforce the penal laws of another within its own dominions. The authority naturally belongs, and is confided, to the tribunals of the nation creating the offenses. In a government formed like ours, where there is a division of sovereignty, and, of course, where there is a danger of collision from the near approach of powers to a conflict with each other, it would seem a peculiarly safe and salutary rule, that each government should be left to enforce its own penal laws in its own tribunals. It has been expressly held by this court, that no part of the criminal jurisdiction of the United States can consistently with the constitution be delegated by congress to state tribunals (*Martin v. Hunter*, 1 Wheat., 304, 337; *S. P., United States v. Lathrop*, 17 Johns., 4); and there is not the slightest inclination to retract that opinion. The judicial power of the Union clearly extends to all such cases. No concurrent power is retained by the states, because the subject-matter derives its existence from the constitution; and the authority of congress to delegate it cannot be implied, for it is not necessary or proper in any constitutional sense. But even if congress could delegate it, it would still remain to be shown that it had so done. We have seen that this cannot be correctly deduced from the act of 1795; and we are, therefore, driven to decide, whether a state can, without such delegation, constitutionally assume and exercise it. It is not, however, admitted that the laws of the United States have not enabled courts-martial to be held under their own authority, for the trial of these offenses, at least when there are militia officers acting in service in conjunction with regular troops. The ninety-seventh article of war gives an authority for the trial of militia, in many cases; and the act of the 18th of April, 1814, c. 141 (which has now expired), provided, as we have already seen, for cases where the militia was acting alone. To what extent these laws applied is not now necessary to be determined. The subject is introduced solely to prevent any conclusion that they are deemed to be wholly inapplicable.

§ 188. *Act of 1795 refers to courts-martial of the United States.*

Upon the whole, I am of opinion that the courts-martial intended by the act of 1795 are not state courts-martial, but those of the United States; and this is the same construction which has been already put upon the same act by the supreme court of Pennsylvania. *Ex parte Bolson*, 5 Hall L. J., 476. What, then, is the state of the case before the court? Congress, by a law, declare that the officers and privates of the militia who shall, when called forth by the president, fail to obey his orders, shall be liable to certain penalties, to be adjudged by a court-martial convened under its own authority. The legislature of Pennsylvania inflict the same penalties for the same disobedience, and direct these penalties to be adjudged by a state court-martial, called exclusively under its own authority. The offense is created by a law of the United States, and is solely against their authority, and made punishable in a specific manner; the legislature of Pennsylvania, without the assent of the United States, insist

upon being an auxiliary, nay, as the defendant contends, a principal, if not a paramount, sovereign, in its execution. This is the real state of the case; and it is said, without the slightest disrespect for the legislature of Pennsylvania, who in passing this act were, without question, governed by the highest motives of patriotism, public honor and fidelity to the Union. If it has transcended its legitimate authority, it has committed an unintentional error, which it will be the first to repair and the last to vindicate. Our duty compels us, however, to compare the legislation, and not the intention, with the standard of the constitution.

§ 189. *Where a penalty is prescribed by congress, to be recovered in a special court or manner, it excludes a recovery in any other mode or court.*

It has not been denied that congress may constitutionally delegate to its own courts exclusive jurisdiction over cases arising under its own laws. It is, too, a general principle in the construction of statutes, that where a penalty is prescribed, to be recovered in a special manner in a special court, it excludes a recovery in any other mode or court. The language is deemed expressive of the sense of the legislature that the jurisdiction shall be exclusive. In such a case, it is a violation of the statute for any other tribunal to assume jurisdiction.

§ 190. *Where congress vests exclusive jurisdiction in a federal court over an offense against the United States, a state law prescribing a punishment for the same offense is void.*

If, then, we strip the case before the court of all unnecessary appendages, it presents this point, that congress had declared that its own courts-martial shall have exclusive jurisdiction of the offense; and the state of Pennsylvania claims a right to interfere with that exclusive jurisdiction, and to decide in its own courts upon the merits of every case of alleged delinquency. Can a more direct collision with the authority of the United States be imagined? It is an exercise of concurrent authority where the laws of congress have constitutionally denied it. If an act of congress be the supreme law of the land, it cannot be made more binding by an affirmative re-enactment of the same act by a state legislature. The latter must be merely inoperative and void; for it seeks to give sanction to that which already possesses the highest sanction. What are the consequences if the state legislation in the present case be constitutional? In the first place, if the trial in the state court-martial be on the merits, and end in a condemnation or acquittal, one of two things must follow: either that the United States courts-martial are thereby divested of their authority to try the same case, in violation of the jurisdiction confided to them by congress; or that the delinquents are liable to be twice tried and punished for the same offense, against the manifest intent of the act of congress, the principles of the common law, and the genius of our free government. In the next place, it is not perceived how the right of the president to pardon the offense can be effectually exerted; for if the state legislature can, as the defendant contends, by its own enactment, make it a state offense, the pardoning power of the state can alone purge away such an offense. The president has no authority to interfere in such a case. In the next place, if the state can re-enact the same penalties, it may enact penalties substantially different for the same offense, to be adjudged in its own courts. If it possess a concurrent power of legislation, so as to make it a distinct state offense, what punishments it shall impose must depend upon its own discretion. In the exercise of that discretion, it is not liable to the control of the United States. It may enact

more severe or more mild punishments than those declared by congress. And thus an offense originally created by the laws of the United States, and growing out of their authority, may be visited with penalties utterly incompatible with the intent of the national legislature. It may be said that state legislation cannot be thus exercised, because its concurrent power must be in subordination to that of the United States. If this be true (and it is believed to be so), then it must be upon the ground that the offense cannot be made a distinct state offense, but is exclusively created by the laws of the United States, and is to be tried and punished as congress has directed, and not in any other manner or to any other extent. Yet the argument of the defendant's counsel might be here urged, that the state law was merely auxiliary to that of the United States; and that it sought only to enforce a public duty more effectually by other penalties, in aid of those prescribed by congress. The repugnancy of such a state law to the national authority would, nevertheless, be manifest, since it would seek to punish an offense created by congress, differently from the declared will of congress. And the repugnancy is not, in my judgment, less manifest, where the state law undertakes to punish an offense by a state court-martial, which the law of the United States confines to the jurisdiction of a national court-martial.

The present case has been illustrated in the argument of the defendant's counsel, by a reference to cases in which state courts, under state laws, exercise a concurrent jurisdiction over offenses created and punished by the laws of the United States. The only case of this description which has been cited at the bar is the forgery of notes of the Bank of the United States, which, by an act of congress, was punished by fine and imprisonment, and which, under state laws, has also been punished in some state courts, and particularly in Pennsylvania. *White v. Commonwealth*, 4 Binn., 418; *Livingston v. Van Ingen*, 9 Johns., 507, 567. In respect to this case, it is to be recollected that there is an express proviso in the act of congress, that nothing in that act should be construed to deprive the state courts of their jurisdiction under the state laws, over the offenses declared punishable by that act. There is no such proviso in the act of 1795, and, therefore, there is no complete analogy to support the illustration.

That there are cases in which an offense particularly aimed against the laws or authority of the United States may, at the same time, be directed against state authority also, and thus be within the legitimate reach of state legislation, in the absence of national legislation on the same subject, I pretend not to affirm or to deny. It will be sufficient to meet such a case when it shall arise. But that an offense against the constitutional authority of the United States can, after the national legislature has provided for its trial and punishment, be cognizable in a state court in virtue of a state law creating a like offense, and defining its punishment, without the consent of congress, I am very far from being ready to admit. It seems to me that such an exercise of state authority is completely open to the great objections which are presented in the case before us. Take the case of a capital offense, as, for instance, treason against the United States; can a state legislature vest its own courts with jurisdiction over such an offense, and punish it, either capitally or otherwise? Can the national courts be ousted of their jurisdiction by a trial of the offender in a state court? Would an acquittal in a state court be a good bar upon an indictment for the offense in the national courts? Can the offender, against the letter of the constitution of the United States, "be subject for the same offense

to be twice put in jeopardy of life or limb?" These are questions which, it seems to me, are exceedingly difficult to answer in the affirmative. The case, then, put by the defendant's counsel, clears away none of the embarrassments which surround their construction of the case at the bar of the court.

Upon the whole, with whatever reluctance, I feel myself bound to declare that the clauses of the militia act of Pennsylvania, now in question, are repugnant to the constitutional laws of congress on the same subject, and are utterly void; and that, therefore, the judgment of the state court ought to be reversed. In this opinion I have the concurrence of one of my brethren.

GREEN v. BIDDLE.

(8 Wheaton, 1-108. 1823.)

CERTIFICATE OF DIVISION from the U. S. Circuit Court, District of Kentucky. Demandants, Green and others, brought a writ of right against Biddle, a tenant, to recover certain lands in Kentucky.

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—The first question certified from the circuit court of Kentucky in this cause is whether the acts of Kentucky, of the 27th of February, 1797, and of the 31st of January, 1812, concerning occupying claimants of land, are unconstitutional? This question depends principally upon the construction of the seventh article of the compact made between Virginia and Kentucky upon the separation of the latter from the former state, that compact being a part of the constitution of Kentucky. The seventh article declares: "That all private rights and interests of lands, within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." We should have been glad, in the consideration of this subject, to have had the benefit of an argument on behalf of the tenant; but as no counsel has appeared for him, and the cause has been for some time before the court, it is necessary to pronounce the decision, which, upon deliberation, we have formed.

§ 191. *Force and effect of a compact between states as to titles to lands.*

As far as we can understand the construction of the seventh article of the compact contended for by those who assert the constitutionality of the laws in question, it is, that it was intended to secure to claimants of lands their rights and interests therein, by preserving a determination of their titles by the laws under which they were acquired. If this be the true and only import of the article, it is a mere nullity; for, by the general principles of law, and from the necessity of the case, titles to real estate can be determined only by the laws of the state under which they are acquired. Titles to land cannot be acquired or transferred in any other mode than that prescribed by the laws of the territory where it is situate. Every government has, and from the nature of sovereignty must have, the exclusive right of regulating the descent, distribution and grants of the domain within its own boundaries; and this right must remain until it yields it up by compact or conquest. When once a title to lands is asserted under the laws of a territory, the validity of that title can be judged of by no other rule than those laws furnish in which it had its origin, for no title can be acquired contrary to those laws; and a title good by those laws cannot be disregarded but by a departure from the first principles of justice. If the article meant, therefore, what has been supposed, it meant only

to provide for the affirmation of that which is the universal rule in the courts of civilized nations, professing to be governed by the dictates of law.

Besides, the title to lands can, in no just sense, in compacts of this sort, be supposed to be separated from the rights and interests in those lands. It would be almost a mockery to suppose that Virginia could feel any solicitude as to the recognition of the abstract validity of titles, when they would draw after them no beneficial enjoyment of the property. Of what value is that title which communicates no right or interest in the land itself? Or how can that be said to be any title at all which cannot be asserted in a court of justice by the owner, to defend or obtain possession of his property?

The language of the seventh article cannot, in our judgment, be so construed. The word title does not occur in it. It declares, in the most explicit terms, that all private rights and interests of lands derived from the laws of Virginia shall remain valid and secure under the laws of Kentucky, and shall be determined by the laws then existing in Virginia. It plainly imports, therefore, that these rights and interests, as to their nature and extent, shall be exclusively determined by the laws of Virginia, and that their security and validity shall not be in any way impaired by the laws of Kentucky. Whatever law, therefore, of Kentucky does narrow these rights and diminish these interests, is a violation of the compact, and is consequently unconstitutional. The only question, therefore, is, whether the acts of 1797 and 1812 have this effect. It is undeniable that no acts of a similar character were in existence in Virginia at the time when the compact was made, and therefore no aid can be derived from the actual legislation of Virginia to support them. The act of 1797 provides that persons evicted from lands to which they can show a plain and connected title in law or equity, without actual notice of an adverse title, shall be exempt from all suits for rents or profits prior to actual notice of such adverse title. It also provides that commissioners shall be appointed by the court pronouncing the judgment of eviction, to assess the value of all lasting and valuable improvements made on the land, prior to such notice, and they are to return the assessment thereof, after subtracting all damages to the land by waste, etc., to the court; and judgment is to be entered for the assessment in favor of the person evicted, if the balance be for him, against the successful party, upon which judgment execution shall immediately issue, unless such party shall give bond for the payment of the same, with five per cent. interest, in twelve months from the date thereof. And if the balance be in favor of the successful party, a like judgment and proceedings are to be had in his favor. The act further provides that the commissioners shall also estimate the value of the lands, exclusive of the improvements; and if the value of the improvements shall exceed the value of the lands, the successful claimant may transfer his title to the other party, and have a judgment in his favor against such party for such estimated value of the lands, etc. There are other provisions not material to be stated.

§ 192. *A law providing that a seater or improver of lands, supposing that he has a good claim upon the land, should have a lien upon such lands for the amount of his expenditures, etc., comes within the constitutional prohibition.*

The act of the 31st of January, 1812, provides that if any person hath seated or improved, or shall thereafter seat or improve, any lands, supposing them to be his own by reason of a claim in law or equity, the foundation of such claim being of public record, but which lands shall be proved to belong to another, the charge and value of such seating and improving shall be paid

by the right owner to such seater or improver, or his assignee, or occupant so claiming. If the right owner is not willing to disburse so much, an estimate is to be made of the value of the lands, exclusive of the seating and improvements; and also of the value of such seating and improvements. If the value of the seating and improving exceeds three-fourths of the value of the lands, if unimproved, then the valuation of the land is to be paid by the seater or improver; if not exceeding three-fourths, then the valuation of the seating and improving is to be paid by the right owner of the land. The act further provides that no action shall be maintained for rents or profits against the occupier, for any time elapsed before the judgment or decree in the suit. The act then provides for the appointment of commissioners to make the valuations; and for the giving of bonds, etc., for the amount of the valuations, by the party who is to pay the same; and in default thereof provides that judgment shall be given against the party for the amount; or if the right owner fails to give bond, etc., the other party may, at his election, give bond, etc., and take the land. And the act then proceeds to declare that the occupant shall not be evicted or dispossessed by a writ of possession, until the report of the commissioners is made, and judgment rendered, or bonds executed in pursuance of the act.

§ 193. — *and the acts of 1797 and 1812 of Kentucky create a lien on lands for improvements. They are in violation of the compact, and unconstitutional.*

From this summary of the principal provisions of the acts of 1797 and 1812, it is apparent that they materially impair the rights and interests of the rightful owner in the land itself. They are parts of a system, the object of which is to compel the rightful owner to relinquish his lands, or pay for all lasting improvements made upon them, without his consent or default; and in many cases those improvements may greatly exceed the original cost and value of the lands in his hands. No judgment can be executed, and no possession obtained for the lands, unless upon the terms of complying with the requisitions of the acts. They, therefore, in effect, create a direct and permanent lien upon the lands for the value of all lasting improvements made upon them; without the payment of which the possession and enjoyment of the lands cannot be acquired. It requires no reasoning to show that such laws necessarily diminish the beneficial interests of the rightful owner in the lands. Under the laws of Virginia, no such burden was imposed on the owner. He had a right to sue for, recover and enjoy them, without any such deductions or payments.

The seventh article of the compact meant to secure all private rights and interests derived from the laws of Virginia, as valid and secure under the laws of Kentucky, as they were under the then existing laws of Virginia. To make those rights and interests so valid and secure, it is essential to preserve the beneficial proprietary interest of the rightful owner in the same state in which they were, by the laws of Virginia, at the time of the separation. If the legislature of Kentucky had declared by law that no person should recover lands in this predicament, unless upon payment, by the owner, of a moiety or of the whole of their value, it would be obvious that the former rights and interests of the owner would be completely extinguished *pro tanto*. If it had further provided that he should be compelled to sell the same at one-half or one-third of their value, or compelled to sell, without his own consent, at a price to be fixed by others, it would hardly be doubted that such laws were a violation of the compact. These cases may seem strong; but they differ not

in the nature, but in the degree only, of the wrong inflicted on the innocent owner. He is no more bound by the laws of Virginia to pay for improvements which he has not authorized, which he did not want, or which he may deem useless, than he is to pay a sum to a stranger for the liberty of possessing and using his own property according to the rights and interests secured to him by those laws. It is no answer, that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests.

It is the unanimous opinion of the court that the acts of 1797 and 1812 are a violation of the seventh article of the compact with Virginia, and therefore are unconstitutional. This opinion renders it unnecessary to give any opinion on the second question certified to us from the circuit court.

REHEARING.

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—In the examination of the first question stated by the court below, we are naturally led to the following inquiries: 1. Are the rights and interests of lands lying in Kentucky, derived from the laws of Virginia prior to the separation of Kentucky from that state, as valid and secure under the above acts as they were under the laws of Virginia on the 18th of December, 1789? If they were not, then, 2. Is the circuit court, in which this cause is depending, authorized to declare those acts, so far as they are repugnant to the laws of Virginia existing at the above period, unconstitutional?

The material provisions of the act of 1797 are as follows: 1. That the occupant of land from which he is evicted by better title, is, in all cases, excused from the payment of rents and profits accrued prior to actual notice of the adverse title, provided his possession in its inception was peaceable, and he shows a plain and connected title, in law or equity, deduced from some record. 2. That the claimant is liable to a judgment against him for all valuable and lasting improvements made on the land prior to actual notice of the adverse title, after deducting from the amount the damages which the land has sustained by waste or deterioration of the soil by cultivation. 3. As to improvements made, and rents and profits accrued, after notice of the adverse title, the amount of the one was to be deducted from that of the other, and the balance was to be added to, or subtracted from, the estimated value of the improvements made before such notice, as the nature of the case should require. But it was provided by a subsequent clause, that in no case should the successful claimant be obliged to pay for improvements made after notice, more than what should be equal to the rents and profits. 4. If the improvements exceed the value of the land in its unimproved state, the claimant was allowed the privilege of conveying the land to the occupant, and receiving in return the assessed value of it without the improvements, and thus to protect himself against a judgment and execution for the value of the improvements. If he should decline doing this, he might recover possession of his land, but then he must pay the estimated value of the improvements, and lose also the rents and profits accrued before notice of the claim. But to entitle him to claim the value of the land, as above mentioned, he must give bond and security to warrant the title.

The act of 1812 contains the following provisions: 1. That the peaceable

occupant of land, who supposes it to belong to him, in virtue of some legal or equitable title, founded on a record, is to be paid by the successful claimant for his improvements. 2. But the claimant may avoid the payment of the value of such improvements, if he please, by relinquishing his land to the occupant, and be paid its estimated value in its unimproved state, thus: If he elect to pay for the value of the improvements, he is to give bond and security to pay the same, with interest, at different instalments. If he fail to do this, or if the value of the improvements exceed three-fourths the value of the unimproved land, an election is given to the occupant to have a judgment entered against the claimant for the assessed value of the improvements, or to take the land, giving bond and security to pay the assessed value of the land, if unimproved, with interest, and by instalments.

But if the claimant is not willing to pay for the improvements, and they should exceed three-fourths the value of the unimproved land, the occupant is obliged to give bond and security to pay the assessed value of the land, with interest, which, if he fail to do, judgment is to be entered against him for such value, the claimant releasing his right to the land, and giving bond and security to warrant the title. If the value of the improvements does not exceed three-fourths that of the land, then the occupant is not bound (as he is in the former case) to give bond and security to pay the value of the land, but he may claim a judgment for the value of his improvements, or take the land, giving bond and security, as before mentioned, to pay the estimated value of the land.

3. The exemption of the occupant from the payment of the rents and profits extends to all such as accrued during his occupancy, before judgment rendered against him in the first instance. But such as accrue after such judgment, for a term not exceeding five years, as also waste and damages committed by the occupant after suit brought, are to be deducted from the value of the improvements, or the court may render judgment for them against the occupant. 4. The amount of such rents and profits, damages and waste, also the value of the improvements, and of the land clear of the improvements, are to be ascertained by commissioners to be appointed by the court, and who act on oath.

These laws differ from each other only in degree; in principle they are the same. They agree in depriving the rightful owner of the land of the rents and profits received by the occupant up to a certain period, the first act fixing it to the time of actual notice of the adverse claim, and the latter act to the time of the judgment rendered against the occupant. They also agree in compelling the successful claimant to pay, to a certain extent, the assessed value of the improvements made on the land by the occupant.

They differ in the following particulars: 1. By the former act the improvements to be paid for must be valuable and lasting. By the latter they need not be either. 2. By the former the successful claimant was entitled to a deduction from the value of the improvements for all damages sustained by the land, by waste or deterioration of the soil by cultivation, during the occupancy of the defendant. By the latter he is entitled to such a deduction only for the damages and waste committed after suit brought. 3. By the former the claimant was bound to pay for such improvements only as were made before notice of the adverse title; if those made afterwards should exceed the rents and profits which afterwards accrued, then he was not liable beyond the rents and profits for the value of such improvements. By the latter he is liable for the value of all improvements made up to the time of the judgment, deducting only the rents and profits accrued, and the damage and waste committed after



suit brought. 4. By the former the claimant might, if he pleased, protect himself against a judgment for the value of the improvements by surrendering the land to his adversary, and giving bond and security to warrant the title. But he was not bound to do so, nor was his giving bond and security to pay the value of the improvements a prerequisite to his obtaining possession of his land, nor was the judgment against him made a lien on the land.

By the latter act the claimant is bound to give such bond, at the peril of losing his land; for if he fail to give it, the occupant is at liberty to keep the land, upon giving bond and security to pay the estimated value of it unimproved; and even this he may avoid where the value of the improvements exceeds three-fourths that of the land, unless the claimant will convey to the occupant his right to the land; for upon this condition alone is judgment to be rendered against the occupant for the assessed value of the land. The only remaining provision of these acts which is at all important, and is not comprised in the above view of them, is the mode pointed out for estimating the value of the land in its unimproved state, of the improvements and of the rents and profits; and this is the same, or nearly so, in both; so that it may be safely affirmed that every part of the act of 1797 is within the purview of the act of 1812; and, consequently, the former act was repealed by the repealing clause contained in the latter. In pursuing the first head of inquiry, therefore, to which this case gives rise, the court will confine its observations to the act of 1812, and compare its provisions with the law of Virginia as it existed on the 18th of December, 1789.

§ 194. *The right to land includes the right to enter on and retain it and receive the rents and issues of the same.*

The common law of England was at that period, as it still is, the law of that state; and we are informed by the highest authority that a right to land, by that law, includes the right to enter on it when the possession is withheld from the right owner; to recover the possession by suit; to retain the possession, and to receive the issues and profits arising from it. *Altham's Case*, 8 Coke, 299. In *Liford's Case*, 11 Coke, 46, it is laid down that the regress of the disseisee reverts the property in him in the fruits or profits of the land, as well those that were produced by the industry of the occupant as those which were the natural production of the land, not only against the disseisor himself, but against his feoffee, lessee or disseisor; "for," says the book, "the act of my disseisor may alter my action, but cannot take away my action, property or right; so that after the regress, the disseisee may seize these fruits, though removed from the land, and the only remedy of the disseisor in such case is to recoup their value against the claim of damages." The doctrine laid down in this case, that the disseisee can maintain trespass only against the disseisor for the rents and profits, is, with great reason, overruled in the case of *Holcomb v. Rawlyns*, Cro. Eliz., 540. See, also, *Bull. N. P.*, 87.

§ 195. — *and a law which denies the owner of land a remedy for the recovery of its possession, except upon conditions, impairs his right to the same.*

Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the

possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired and rendered insecure according to the nature and extent of such restrictions. A right to land essentially implies a right to the profits accruing from it, since, without the latter, the former can be of no value. Thus a devise of the profits of land, or even a grant of them, will pass a right to the land itself. Shep. Touch., 93; Co. Litt., 4, b. "For what," says Lord Coke, in this page, "is the land, but the profits thereof?" Thus stood the common law in Virginia at the period before mentioned; and it is not pretended that there was any statute of that state less favorable to the rights of those who derived title under her than the common law. On the contrary, the act respecting writs of right declares in express terms that "if the demandant recover his seisin he may recover damages to be assessed by the recognitors of assize, for the tenant's withholding possession of the tenement demanded;" which damages could be nothing else but the rents and profits of the land. Last Revisal, vol. 2, p. 463. This provision of the act was rendered necessary on account of the intended repeal of all the British statutes, and the denial of damages by the common law in all real actions, except in assize, which was considered as a mixed action. Co. Litt., 257. But in trespass *quare clausum fregit*, damages were always given at common law. 10 Coke, 116. And that the successful claimant of land in Virginia, who recovers in ejectment, was at all times entitled to recover rents and profits in an action of trespass, was not and could not be questioned by the counsel for the tenant in this case.

§ 196. *No principle of equity in Virginia, in 1789, exempted the wrongful occupant of land from the payment of profits to the real owner upon his successfully establishing his right to the land.*

If, then, such was the common and statute law of Virginia in 1789, it only remains to inquire whether any principle of equity was recognized by the courts of that state which exempted the occupant of land from the payment of rents and profits to the real owner who has successfully established his right to the land either in a court of law or of equity? No decision of the courts of that state was cited or is recollected which in the remotest degree sanctions such a principle. The case of *Southall v. M'Keand*, 1 Wash. (Va.), 336, which was much relied upon by the counsel for the tenant, relates altogether to the subject of improvements, and decides no more than this, that if the equitable owner of land, who is conscious of his right to it, will stand by and see another occupy and improve the property, without asserting his right to it, he shall not, in equity, enrich himself by the loss of another which it was in his power to have prevented, but must be satisfied to recover the value of the land, independent of the improvements. The acquiescence of the owner in the adverse possession of a person whom he found engaged in making valuable improvements on the property was little short of a fraud, and justified the occupant in the conclusion that the equitable claim which the owner asserted had been abandoned. How different is the principle of this case from that which governs the same subject by the act under consideration. By this, the principle is applicable to all cases whether, at law or in equity, whether the claimant knew or did not know of his rights and of the improvements which were making on the land, and even after he had asserted his right by suit.

The rule of the English court of chancery, as laid down in 1 Madd. Ch., 72, is fully supported by the authorities to which he refers. It is, that equity

allows an account of rents and profits, in all cases, from the time of the title accrued, provided that do not exceed six years, unless under special circumstances; as where the defendant had no notice of the plaintiff's title, nor had the deeds and writings in his custody, in which the plaintiff's title appeared; or where there has been laches in the plaintiff in not asserting his title, or where the plaintiff's title appeared by deeds in a stranger's custody; in all which cases, and others similar to them in principle, the account is confined to the time of filing the bill. The language of Lord Hardwicke in *Dormer v. Fortescue*, 3 Atk., 128, which was the case of an infant plaintiff, is remarkably strong. "Nothing," he observes, "can be clearer, both in law and equity, and from natural justice, than that the plaintiff is entitled to the rents and profits from the time when his title accrued." His lordship afterwards adds, that "where the title of the plaintiff is purely equitable, that court allows the account of rents and profits from the time the title accrued, unless under special circumstances, such as have been referred to."

§ 197. *The civil and common law compared.*

Nor is it understood by the court that the principles of the act under consideration can be vindicated by the doctrines of the civil law, admitting, which we do not, that those doctrines were recognized by the laws of Virginia, or by the decisions of her courts. The exemption of the occupant, by that law, from an account for profits is strictly confined to the case of a *bona fide* possessor, who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it. Most unquestionably this character cannot be maintained for a moment after the occupant has notice of an adverse claim, especially if that be followed up by a suit to recover the possession. After this, he becomes a *mala fide* possessor, and holds at his peril, and is liable to restore all the mesne profits, together with the land. Just., Lib. 2, tit. 1, sec. 35.

There is another material difference between the civil law and the provisions of this act, altogether favorable to the right of the successful claimant. By the former, the occupant is entitled only to those fruits or profits of the land which were produced by his own industry, and not even to those, unless they were consumed; if they were realized, and contributed to enrich the occupant, he is accountable for them to the real owner, as he is for all the natural fruits of the land. See Just., the section before quoted; Lord Kaimes, B. 2, ch. 1, p. 411 *et seq.* Puffendorf, indeed, B. 4, ch. 7, sec. 3, lays it down in broad and general terms, that fruits of industry, as well as those of nature, belong to him who is master of the thing from which they flow. By the act in question, the occupant is not accountable for profits, from whatever source they may have been drawn, or however they may have been employed, which were received by him prior to the judgment of eviction.

But even these doctrines of the civil law, so much more favorable to the rights of the true owner of the land than the act under consideration, are not recognized by the common law of England. Whoever takes and holds the possession of land to which another has a better title, whether by disseisin, or under a grant from the disseisor, is liable to the true owner for the profits which he has received, of whatever nature they may be, and whether consumed by him or not; and the owner may even seize them, although removed from the land, as has already been shown by *Liford's Case*, 11 Coke, 46. We are not aware of any common law case which recognizes the distinction between *bona fide* possessor, and one who holds *mala fide*, in relation to the subject of rents

and profits; and we understand *Liford's Case* as fully proving that the right of the true owner to the mesne profits is equally valid against both. How far this distinction is noticed in a court of equity has already been shown. Upon the whole, then, we take it to be perfectly clear, that, according to the common law, the statute law of Virginia, the principles of equity, and even those of the civil law, the successful claimant of land is entitled to an account of the mesne profits received by the occupant from some period prior to the judgment of eviction, or decree. In a real action, as this is, no restriction whatever is imposed by the law of Virginia upon the recognitors, in assessing the damages for the demandant, except that they should be commensurate with the withholding of the possession.

§ 198. *The act of 1812 violates the constitution of the state and is void.*

If this act of Kentucky renders the rights of claimants to lands under Virginia less valid and secure than they were under the laws of Virginia, by depriving them of the fruits of their land during its occupation by another, its provisions in regard to the value of the improvements put upon the land by the occupant can, with still less reason, be vindicated. It is not alleged by any person that such a claim was ever sanctioned by any law of Virginia, or by her courts of justice. The case of *Southall v. M'Keand*, 1 Wash. (Va.), 336, has already been noticed and commented upon. It is laid down, we admit, in *Coulter's Case*, 5 Coke, 30, that the disseisor, upon a recovery against him, may recoup the damages to the value of all that he has expended in amending the houses. See, also, Bro., tit. Damages, pl. 82, who cites 24 Edward III., 50. If any common law decision has ever gone beyond the principle here laid down, we have not been fortunate enough to meet with it. The doctrine of *Coulter's Case* is not dissimilar in principle from that which Lord Kaimes considers to be the law of nature. His words are, "it is a maxim, suggested by nature, that reparations and meliorations bestowed upon a house, or on land, ought to be defrayed out of the rents. By this maxim we sustain no claim against the proprietor for meliorations, if the expense exceed not the rents levied by the *bona fide* possessor." He cites Papinian, L. 48, *de rei vindicatione*. Taking it for granted that the rule, as laid down in *Coulter's Case*, would be recognized as good law by the courts of Virginia, let us see in what respects it differs from the act of Kentucky. That rule is, that meliorations of the property (which, necessarily, mean valuable and lasting improvements), made at the expense of the occupant of the land, shall be set off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession. But, by the act, the occupant is entitled to the value of the improvements, to whatever extent they may exceed that of the profits; not on the ground of set-off against the profits, but as a substantive demand. For the account for improvements is carried down to the day of the judgment, although the occupant was for a great part of the time a *mala fide* possessor, against whom no more can be offset but the rents and profits accrued after suit brought. Thus it may happen that the occupant, who may have enriched himself to any amount by the natural, as well as the industrial, products of land to which he had no legal title (as by the sale of timber, coal, ore, or the like), is accountable for no part of those profits but such as accrued after suit brought; and, on the other hand, may demand full remuneration for all the improvements made upon the land, although they were placed there by means of those very profits, in violation of that maxim of equity, and of natural law, *nemo debet locupletari aliena jactura*.

If the principle which this law asserts has a precedent to warrant it, we can

truly say that we have not met with it. But we feel the fullest confidence in saying that it is not to be found in the laws of Virginia, or in the decisions of her courts. But the act goes further than merely giving to the occupant a substantive claim against the owner of the land for the value of the improvements, beyond that of the profits received since the suit brought. It creates a binding lien on the land for the value of the improvements, and transfers the right of the successful claimant in the land to the occupant, who appears, judicially, to have no title to it, unless the former will give security to pay such value within a stipulated period. In other words, the claimant is permitted to purchase his own land by paying to the occupant whatever sum the commissioners may estimate the improvements at, whether valuable and lasting, or worthless and unserviceable to the owner, although they were made with the money justly and legally belonging to the owner; and upon these terms only can he recover possession of his land.

If the law of Virginia has been correctly stated, need it be asked whether the right and interest of such a claimant is as valid and secure under this act as it was under the laws of Virginia, by which, and by which alone, they were to be determined? We think this can hardly be asserted. If the article of the compact, applicable to this case, meant anything, the claimant of land under Virginia had a right to appear in a Kentucky court, as he might have done in a Virginia court if the separation had not taken place, and to demand a trial of his right by the same principles of law which would have governed his case in the latter state. What those principles are have already been shown. If the act in question does not render the right of the true owner less valid and secure than it was under the laws of Virginia, then an act declaring that no occupant should be evicted but upon the terms of his being paid the value or double the value of the land by the successful claimant would not be chargeable with that consequence, since it cannot be denied but that the principle of both laws would be the same. The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is, that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract without the consent of the surety, the latter is discharged, although the change was for his advantage.

§ 199. *A compact between states, with the implied consent of congress, is valid.*

2. The only remaining question is, whether this act of 1812 is repugnant to the constitution of the United States, and can be declared void by this court, or by the circuit court, from which this case comes by adjournment? But, previous to the investigation of this question, it will be proper to relieve the case from some preliminary objections to the validity and construction of the compact itself. 1. It was contended by the counsel for the tenant, that the compact was invalid *in toto*, because it was not made in conformity with the provisions of the constitution of the United States; and, if not invalid to that extent, still, 2. The clause of it applicable to the point in controversy was so, inasmuch as it surrenders, according to the construction given to it by the opposite counsel, rights of sovereignty which are unalienable.

1. The first objection is founded upon the allegation that the compact was

made without the consent of congress, contrary to the tenth section of the first article, which declares that “no state shall, without the consent of congress, enter into any agreement or compact with another state, or with a foreign power.” Let it be observed, in the first place, that the constitution makes no provision respecting the mode or form in which the consent of congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason. The only question in cases which involve that point is, has congress, by some positive act, in relation to such agreement, signified the consent of that body to its validity? Now, how stands the present case? The compact was entered into between Virginia and the people of Kentucky, upon the express condition that the general government should, prior to a certain day, assent to the erection of the district of Kentucky into any independent state, and agree that the proposed state should immediately after a certain day, or at some convenient time future thereto, be admitted into the federal Union. On the 28th of July, 1790, the convention of that district assembled, under the provisions of the law of Virginia, and declared its assent to the terms and conditions prescribed by the proposed compact; and that the same was accepted as a solemn compact, and that the said district should become a separate state on the 1st of June, 1792. These resolutions, accompanied by a memorial from the convention, being communicated by the president of the United States to congress, a report was made by a committee, to whom the subject was referred, setting forth the agreement of Virginia that Kentucky should be erected into a state, upon certain terms and conditions, and the acceptance by Kentucky upon the terms and conditions so prescribed; and, on the 4th of February, 1791, congress passed an act (1 Stats. at Large, 189) which, after referring to the compact, and the acceptance of it by Kentucky, declares the consent of that body to the erecting of the said district into a separate and independent state, upon a certain day, and receiving her into the Union.

Now, it is perfectly clear that although congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent state without the assent of Virginia, or upon terms variant from those which Virginia had prescribed. But congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed by a solemn act the consent of that body to the separation. The terms and conditions, then, on which alone the separation could take place, or the act of congress become a valid one, were necessarily assented to; not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this, is to deny the validity of the act of congress, without which Kentucky could not have become an independent state; and then it would follow that she is at this moment a part of the state of Virginia, and all her laws are acts of usurpation. The counsel who urged this argument would not, we are persuaded, consent to this conclusion; and yet it would seem to be inevitable, if the premises insisted upon be true.

§ 200. *A state may surrender any of its sovereign character, provided the surrender is made by the people in their sovereign capacity.*

2. The next objection, which is to the validity of the particular clause of the compact involved in this controversy, rests upon a principle the correctness of which remains to be proved. It is practically opposed by the theory of all limited governments, and especially of those which constitute this Union. The

powers of legislation granted to the government of the United States, as well as to the several state governments, by their respective constitutions, are all limited. The article of the constitution of the United States involved in this very case is one, amongst many others, of the restrictions alluded to. If it be answered that these limitations were imposed by the people in their sovereign character, it may be asked, was not the acceptance of the compact the act of the people of Kentucky in their sovereign character? If, then, the principle contended for be a sound one, we can only say that it is one of a most alarming nature, but which, it is believed, cannot be seriously entertained by any American statesman or jurist.

§ 201. — *and the compact made between the states, that the rights of the owners of lands should be inviolate, was binding.*

Various objections were made to the literal construction of the compact, one only of which we deem it necessary particularly to notice. That was, that if it be so construed as to deny to the legislature of Kentucky the right to pass the act in question, it will follow that that state cannot pass laws to affect lands, the title to which was derived under Virginia, although the same should be wanted for public use. If such a consequence grows necessarily out of this provision of the compact, still we can perceive no reason why the assent to it by the people of Kentucky should not be binding on the legislature of that state. Nor can we perceive why the admission of the conclusion involved in the argument should invalidate an express article of the compact in relation to a quite different subject. The agreement that the rights of claimants under Virginia should remain as valid and secure as they were under the laws of that state contains a plain, intelligible proposition, about the meaning of which it is impossible there can be two opinions. Can the government of Kentucky fly from this agreement, acceded to by the people in their sovereign capacity, because it involves a principle which might be inconvenient, or even pernicious, to the state in some other respect? The court cannot perceive how this proposition could be maintained. But the fact is that the consequence drawn by counsel from a literal construction of this article of the compact cannot be fairly deduced from the premises, because, by the common law of Virginia, if not by the universal law of all free governments, private property may be taken for public use upon making to the individual a just compensation. The admission of this principle never has been imagined by any person as rendering his right to property less valid and secure than it would be were it excluded; and consequently it would be an unnatural and forced construction of this article of the compact to say that it included such a case.

§ 202. *Where words of a law or contract are clear, construction contrary is excluded.*

We pass over the other observations of counsel upon the construction of this article, with the following remark: that where the words of a law, treaty or contract have a plain and obvious meaning, all construction in hostility with such meaning is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained.

We now come to the consideration of the question whether this court has authority to declare the act in question unconstitutional and void upon the ground that it impairs the obligation of the compact. This is denied for the

following reasons: It is insisted, in the first place, that this court has no such authority where the objection to the validity of the law is founded upon its opposition to the constitution of Kentucky, as it was in part in this case. It will be a sufficient answer to this observation that our opinion is founded exclusively upon the constitution of the United States.

§ 203. *The stipulation that all controversies over the scope of the compact should be settled by commissioners covered controversies between the two commonwealths only, not between private citizens.*

2. It was objected that Virginia and Kentucky, having fixed upon a tribunal to determine the meaning of the compact, the jurisdiction of this court is excluded. If this be so, it must be admitted that all controversies which involve a construction of the compact are equally excluded from the jurisdiction of the state courts of Virginia and Kentucky. How, then, are those controversies, which we were informed by the counsel on both sides crowded the federal and state court, of Kentucky, to be settled? The answer, we presume, would be, by commissioners to be appointed by those states. But none such have been appointed; what then? Suppose either of those states, Virginia, for example, should refuse to appoint commissioners. Are the occupants of lands to which they have no title to retain their possessions until this tribunal is appointed, and to enrich themselves in the meantime by the profits of them, not only to the injury of non-residents, but of the citizens of Kentucky? The supposition of such a state of things is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it. But how happens it that the questions submitted to this court have been entertained and decided by the courts of Kentucky for twenty-five years, as we were informed by the counsel? Have these courts, cautious and learned as they must be acknowledged to be, committed the crime of usurping a jurisdiction which did not belong to them? We should feel very unwilling to come to such a conclusion. The answer, in a few words, to the whole of the argument, is to be found in the explicit language of that provision of the compact which respects the tribunal of the commissioners. It is to be appointed in no case but where a complaint or dispute shall arise, not between individuals, but between the commonwealth of Virginia and the state of Kentucky, in their high sovereign characters.

§ 204. *Power of the supreme court to declare a law unconstitutional.*

Having thus endeavored to clear the question of these preliminary objections, we have only to add, by way of conclusion, that the duty, not less than the power, of this court, as well as of every other court in the Union, to declare a law unconstitutional which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoined by the constitution itself, and too firmly established by the decisions of this and other courts, to be now shaken; and that those decisions entirely cover the present case.

§ 205. *A contract is the agreement of two or more parties to do or not to do certain acts.*

A slight effort to prove that a compact between two states is not a case, within the meaning of the constitution, which speaks of contracts, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties to do or not to do certain acts, it must be obvious that the propositions offered and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous, and in *Fletcher v.*



Peck, 6 Cranch, 87 (§§ 1805-12, *infra*), the chief justice defines a contract to be a compact between two or more parties.

§ 206. *The compact between Kentucky and Virginia was a contract, the obligation of which Kentucky could not impair.*

The principles laid down in that case are, that the constitution of the United States embraces all contracts, executed or executory, whether between individuals or between a state and individuals, and that a state has no more power to impair an obligation into which she herself has entered than she can the contracts of individuals. Kentucky, therefore, being a party to the compact which guaranteed to claimants of land lying in that state, under titles derived from Virginia, their rights as they existed under the laws of Virginia, was incompetent to violate that contract by passing any law which rendered those rights less valid and secure. It was said by the counsel for the tenant that the validity of the above laws of Kentucky have been maintained by an unvarying series of decisions of the courts of that state, and by the opinions and declarations of the other branches of her government. Not having had an opportunity of examining the reported cases of the Kentucky courts, we do not feel ourselves at liberty to admit or deny the first part of this assertion. We may be permitted, however, to observe that the principles decided by the court of appeals of that state, in the cases of *Hoy v. M'Murry*, 1 Litt., 364, a manuscript report of which was handed to the court when this cause was argued, are in strict conformity with this opinion. As to the other branches of the government of that state, we need only observe that whilst the legislature has maintained the opinion, most honestly, we believe, that the acts of 1797 and 1812 were consistent with the compact, the objections of the governor to the validity of the latter act, and the reasons assigned by him in their support, taken in connection with the above case, incline us strongly to suspect that a great diversity of opinion prevails in that state upon the question we have been examining. However this may be, we hold ourselves answerable to God, our consciences and our country to decide this question according to the dictates of our best judgment, be the consequences of the decision what they may. If we have ventured to entertain a wish as to the result of the investigation which we have laboriously given to the case, it was that it might be favorable to the validity of the laws, our feelings being always on that side of the question, unless the objections to them are fairly and clearly made out.

The above is the opinion of a majority of the court. The opinion given upon the first question proposed by the circuit court renders it unnecessary to notice the second question.

WITHERS v. BUCKLEY.

(20 Howard, 84-94. 1857.)

§ 207. *Authority of state to change the course of a navigable tributary of the Mississippi river.*

Opinion by MR. JUSTICE DANIEL.

Upon a writ of error to the high court of errors and appeals of the state of Mississippi, under the authority of the twenty-fifth section of the act of congress of September 24, 1789, establishing the judicial courts of the United States. The plaintiff in error, by his bill in the state court, alleged that he is the owner of a large and valuable plantation in the state of Mississippi, situated on what is called *Old river*, being a former bed of the Mississippi river,

but which was cut off and made derelict by a change in the course of the Mississippi in the year 1796. That the Homochitto river, in said state, empties its waters into the said Old river at a point above, or north of, the complainant's plantation, and at lower stages of the waters of the Mississippi the waters of the Homochitto pass around through the bed of Old river, and out by the narrows thereof into the Mississippi. That the flow of the waters of the Homochitto removes the deposits of mud occasioned by the overflow of the Mississippi, and thus keeps open the outlet of Old river, to the great advantage of the complainant, and of others similarly situated on Old river.

That the legislature of Mississippi, by a law approved on the 5th of March, 1850, entitled "An act regulating and defining the powers of the commissioners of Homochitto river," appointed the defendants commissioners for the purpose of "improving the navigation of the Homochitto river, and any outlet from the same, through Old river and Buffalo bayou to the Mississippi river, and for removing any obstructions in said streams, and excavating and digging a canal unto the Buffalo from the Homochitto river, or from Old river, into the Buffalo." That said canal commences on Old river below the mouth of the Homochitto river, and above the lands of the complainant, and will neither begin, pass through, nor terminate upon, the lands of the complainant. That the complainant and his grantors have ever enjoyed and used the waters flowing through his and their lands for agricultural and domestic purposes, and for navigation in transporting their crops to markets and receiving supplies therefrom; first, when Old river was a part of the Mississippi, and since the cut-off in 1796, by the waters supplied to Old river from the Homochitto, and the back waters of the Mississippi in time of floods. That, by the said laws of Mississippi, no compensation is provided for the injury to be done to the complainant by the diversion of the waters of the Homochitto and Old river from the lands of complainant, and the destruction of the navigation which said waters afford to his plantation, because said canal or contemplated outlet is not to be made upon the complainant's lands. The bill of the complainant then charged that the laws of Mississippi are invalid for having omitted to provide compensation for the injury to be inflicted by them upon the complainant, and are, by that omission, in violation of the fundamental laws both of the United States and of the state of Mississippi, the constitutions of both of which declare that private property shall not be taken for public use without just compensation being made therefor; and are also in violation of the act of congress of March 1, 1817, authorizing the people of Mississippi to form a constitution, and of the ordinance passed on the 15th of August, 1817, in pursuance of the act of congress, both the act of congress and ordinance providing that the Mississippi river, and the navigable rivers leading into the same, shall be common highways, and forever free, as well to the inhabitants of Mississippi as to other citizens of the United States. To this bill a demurrer was interposed by the defendants in error, and the cause having been carried to the high court of errors and appeals of Mississippi, by that court the demurrer was sustained, and the bill dismissed, with costs.

§ 207a. *The supreme court has not jurisdiction to decide whether a state statute is in conflict with the state constitution.*

The correctness or incorrectness of the decree of the high court of errors and appeals is the subject of inquiry and decision now before this court. In the prosecution of our inquiry, it is proper to disembarass it of matters with which it has been attempted to associate or surround it; matters having no just con-

nection therewith, and the introduction of which tends only to obstruct and obscure the elucidation of truth. Thus it is charged in the complainant's bill, that the law authorizing the improvement of the Homochitto river is void, because it violates the constitution of Mississippi, by omitting to provide a compensation for the injury which might be done to individuals by carrying that law into effect; the constitution of the state having declared that private property shall not be taken for public use without just compensation being made therefor. In answer to this charge it is sufficient to state that this court never has, and does not, assume the right to pronounce authoritatively upon the wisdom or justice of the legislation of the states, when operating upon their own citizens, and upon subjects of property clearly within their own territory and appropriate cognizance, except so far as the constitution of the United States expressly, or by inevitable implication, may have made it the duty of this court to control the action of the state governments. Nor has it been deemed the province of this court to abrogate or overrule the interpretation put upon their own respective statutes by the courts of the several states, whether such interpretation had reference to the ordinary rights of person or property, or to the nature and extent of the legislative powers vested by the constitutions of the several states, and their coincidence with acts of legislation performed under the delegation of those powers. These are functions wisely and necessarily left by this court untouched in the state tribunals, the assumption of which by the federal judiciary, as it would embrace every matter upon which the governments of the states could operate, would, in effect, amount to the annihilation of those governments. The doctrine of this court as here stated has been clearly affirmed.

In the case of *Jackson v. Lamphire*, 3 Pet., 280 (§§ 1840-48, *infra*), this court has declared that it "has no authority, on a writ of error from a state court, to declare a state law void on account of its collision with a state constitution, it not being a case embraced in the judiciary act, which alone gives power to issue a writ of error to the state court." This court say "that they will therefore refrain from expressing any opinion on the points made by counsel in relation to the constitution of New York." See, also, the ruling of this court upon the construction of state laws, in the cases of *Polk v. Wendal*, in 9 Cranch, 87, and of the *West River Bridge Co. v. Dix*, 6 How., 507 (§§ 2188-90, *infra*). The conformity, therefore, to the state constitution, of the statute appointing the commissioners of the Homochitto river, and prescribing their powers and duties, was a question appropriately belonging to the state court, and its decision of that question is not properly subject to re-examination here.

§ 208. *The first ten amendments of the constitution of the United States are restrictions upon the federal government and not upon the states.*

The statute of Mississippi is next assailed, on the charge that it violates the fifth article of the amendments of the constitution of the United States, of which the clause in the constitution of Mississippi, relied on by the plaintiff in error, is a literal transcript. In this charge is instanced another effort to confuse and obstruct the only legitimate inquiry arising on the record before us, viz., that which relates to the authority of the high court of errors and appeals of Mississippi, for their decree pronounced in this cause. To every person acquainted with the history of the federal government, it is familiarly known that the ten amendments first engrafted upon the constitution had their origin in the apprehension that in the investment of powers made by that instrument in the federal government, the safety of the states and their citizens had not been

sufficiently guarded. That from this apprehension arose the chief opposition shown to the adoption of the constitution. That, in order to remove the cause of this apprehension, and to effect that security which it was feared the original instrument had failed to accomplish, twelve articles of amendment were proposed at the first session of the first congress, and the ten first articles in the existing series of amendments were adopted and ratified by congress and by the states, two of the twelve proposed amendments having been rejected. The amendments thus adopted were designed to be modifications of the powers vested in the federal government, and their language is susceptible of no other rational, literal or verbal acceptance. In this acceptance this court has repeatedly and uniformly expounded those amendments in cases having reference to retroactive statutes, to the right of eminent domain, to the execution of plans for internal improvement; in opposition to which, the clause in the fifth article of the amendments of the constitution has been urged. In all such cases, this court has ruled that the clause in question was applicable to the federal government alone, and not to the states, except so far as it was designed for their security against federal power. Indeed, so full, so emphatic and conclusive, is the doctrine of this court, as promulgated by the late Chief Justice Marshall, in the case of *Barron v. Mayor & City Council of Baltimore*, in 7 Pet., 247, that it would seem to require nothing less than an effort to unsettle the most deliberate and best-considered conclusions of the court, to attempt to shake or disturb that doctrine. An extract from the reasoning of the chief justice, so full, so unanswerable on this point, may not be unfruitful of benefit as a guide to the future. After stating that the case was brought before the court in virtue of the twenty-fifth section of the judiciary act, the chief justice proceeds: "The plaintiff in error contends that it comes within that clause of the fifth amendment to the constitution which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented we think of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States for themselves; for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best adapted to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted by the instrument itself; not of distinct governments, framed by different persons, and for different purposes. If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge *exclusively*, and with which others interfere no farther than they are supposed to have a common interest."

Again, adverting to the causes which led to the proposal and adoption of the amendments of the constitution, the same judge remarks (*id.*, p. 250)—and these remarks embrace the whole series of articles adopted—"In almost every convention in which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government; not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them." *Vide*, also, the cases of *Fox v. State of Ohio*, 5 How., 410 (§§ 496-500, *infra*), and of *West River Bridge Co. v. Dix*, 6 How., 507 (§§ 2188-90, *infra*). From the foregoing view, it follows that neither the constitution and laws of Mississippi, as interpreted by the high court of that state, nor the provision of the fifth article of the amendments of the federal constitution, as construed by this court, can have any just applicability to the legitimate inquiry now before us.

§ 209. *The act of congress for the admission of Mississippi as a state, and providing for free navigation of the Mississippi river, does not impair the sovereignty of that state. (a)*

The remaining objection to the decree of the high court of errors and appeals—that which is most directly pertinent to the present controversy—is that founded upon the allegation that the law of Mississippi of March 5, 1850, creating the board of commissioners of the Homochitto, for the purpose of improving the navigation of that river, and of any outlet from the same through Old river and Buffalo bayou to the Mississippi, and for excavating a canal into the Buffalo from the Homochitto, or from Old river to the Buffalo, is a violation of the act of congress of the 1st of March, 1817, authorizing the people of the Mississippi territory to form a constitution, which act declares "that the Mississippi river, and the navigable rivers and waters leading into the same, shall be common highways, and forever free as well to the inhabitants of the state of Mississippi as to other citizens of the United States." In considering this act of congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new state in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the confederacy, from the language of the constitution adopted by the states, and from the rule of interpretation pronounced by this court in the case of *Pollard v. Hagan*, 3 How., 223. The act of congress of March 1, 1817, in prescribing the free navigation of the Mississippi and the navigable waters flowing into this river, could not have been designed to inhibit the power inseparable from every sovereign or efficient government, to devise and to execute measures for the improvement of the state, although such measures might induce or render necessary changes in the channels or courses of rivers within the interior of the state, or might be productive of a change in the value of private property. Such consequences are not unfrequently and indeed unavoidably incident to public and general measures highly promotive of and absolutely necessary to the public good. And here it may be asked, whether the law

(a) *S. P., Woodman v. Kilbourn Manuf. Co.*, 6 Am. L. Reg. (N. S.), 238.

complained of, and the measures said to be in contemplation for its execution, are in reality in conflict with the act of congress of March 1, 1817, with respect either to the letter or the spirit of the act? On this point may be cited the case of *Veazie v. Moor*, in 14 How., 568 (§ 1202, *infra*).

By the allegations of the bill it appears that this trace or channel, which is distinguished by the appellation of Old river, is not in fact, and never was, a separate navigable river. It was once the bed or channel of the Mississippi, but, by natural causes, the latter many years since changed its bed or course, thereby rendering derelict the former bed or channel, which would be wholly without water, except what occasionally is forced into it from freshets in the Mississippi, and that which is received from the current of the Homochitto. With no propriety of language, then, can it be pretended that the contemplated communication between the Homochitto and the Buffalo bayou would be the violation of a law which declares that the waters of the Mississippi, and the navigable rivers and waters leading into the same, shall be common highways, and forever free as well to the inhabitants of the state as to other citizens of the United States. Old river was once the bed or a portion of the Mississippi, but never a separate navigable river flowing into the Mississippi. Any improvement, therefore, in the facilities of reaching the Mississippi by another river cannot be an obstruction in what never was, in any correct sense of the phrase, a navigable river leading or flowing into the Mississippi.

But, for argument, let it be conceded that this derelict channel of the Mississippi, called Old river, is in truth a navigable river leading or flowing into the Mississippi; it would by no means follow that a diversion into the Buffalo bayou of waters, in whole or in part, which pass from Homochitto into Old river, would be a violation of the act of congress of March 1, 1817, in its letter or its spirit; or of any condition which congress had power to impose on the admission of the new state. It cannot be imputed to congress that they ever designed to forbid, or to withhold from the state of Mississippi, the power of improving the interior of that state, by means either of roads or canals, or by regulating the rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or the flow of rivers situated within the interior of the state. Could such an intention be ascribed to congress, the right to enforce it may be confidently denied. Clearly, congress could exact of the new state the surrender of no attribute inherent in her character as a sovereign independent state, or indispensable to her equality with her sister states, necessarily implied and guaranteed by the very nature of the federal compact. Obviously, and it may be said primarily, among the incidents of that equality, is the right to make improvements in the rivers, water courses, and highways, situated within the state. Thus situated, as appears on the face of the bill, are the derelict bed of the Mississippi, called Old river, the Homochitto river, the Buffalo bayou, and the line of the canal by which it is proposed that the two last shall be united for the more easy and certain access to the Mississippi.

The act of the legislature of Mississippi, therefore, is strictly within the legitimate and even essential powers of the state, is in violation of neither the constitution nor laws of the United States, and presents no conjuncture or aspect by which this court would be warranted to supervise or control the decree of the high court of errors and appeals of Mississippi. We are therefore of the opinion that the decree of that court be affirmed.

§ 210. Powers of congress generally.—All the powers conferred on congress, both the express and non-enumerated, must be regarded as related to each other, and all means for a common end. *Legal Tender Cases*, 12 Wall., 457. For the principles discussed in the *Legal Tender Cases*, see MONEY.

§ 211. The general government is invested with all those inherent and implied powers which, at the time of adopting the constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions. (Per BRADLEY, J.) *Ibid.*

§ 212. The cession of power to the general government means no more than that they may assume the exercise of it whenever they think it advisable. *Martin v. Hunter*, 1 Wheat., 304.

§ 213. It is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantial powers expressly defined, or from them all combined. *Legal Tender Cases*, 12 Wall., 457.

§ 214. A grant of power in the constitution is to be construed according to the fair and reasonable import of its terms, and its construction is not necessarily to be controlled by a reference to what existed when the constitution was adopted. So, under an indictment for sending prohibited matter through the mails, the question whether congress had properly exercised its power of exclusion does not depend upon the state of things existing at the time of the adoption of the constitution as to the exclusion of matter from the mails. *In re Jackson*, 14 Blatch., 251.

§ 215. Where the end is legitimate and within the scope of the constitution, all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional, as "laws necessary and proper for carrying into execution" powers expressly granted. *Hepburn v. Griswold*, 6 Wall., 603.

§ 216. In considering the constitutionality of an act of congress, it seems that it is entirely immaterial what clause of the constitution congress had in mind at the time of the passing of the law, for if it can be sustained under any clause of the constitution, it is valid and binding. *Columbus Ins. Co. v. Curtin*, 6 McL., 214.

§ 217. The act of June 22, 1874, amending the bankrupt act, and making it necessary for at least one-fourth of the creditors in number, and one-third in value, to join in the petition to have their debtor adjudged a bankrupt, and providing that this provision shall apply to all cases of compulsory or involuntary bankruptcy commenced since December 1, 1873, does not apply to cases where an adjudication of bankruptcy has been had before the date of the act; since this would be beyond the power of congress, and no act will be so construed as to transgress the power of congress, unless the intention is expressed in the plainest and most unambiguous language. *In re Comstock*, 3 Saw., 123; *The Sloop Elizabeth*, 1 Paine, 15.

§ 218. The laws of the United States are the supreme law of the land, and cannot be changed, altered, modified or repealed by state enactments. Nor can any right or privilege given or secured by them be abrogated, displaced or suspended by such state enactments. A maritime lien is as much a right as a mortgage or a bottomry bond, and it seems that a state law which should declare that a maritime lien should have no effect in the state, or which should postpone it to a lien given by the state law, would have no binding force or effect. *Harris v. The Steamboat Henrietta*, Newb., 288; *Ashbrook v. Steamer Golden Gate*, id., 307.

§ 219. Power to enact necessary laws.—The authority expressly given to congress to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in congress and all other powers vested by the constitution in the government of the United States or in any department or officer thereof, includes the right to employ freely every means, not prohibited, necessary for the preservation of the government and the fulfilment of its acknowledged powers. *Legal Tender Cases*, 12 Wall., 457.

§ 220. The necessity spoken of in the gift of authority to congress to enact laws "necessary and proper" for the execution of all powers created by the constitution, is not to be understood as an absolute one. On the contrary, a sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. *Ibid.*

§ 221. The degree of necessity for any congressional enactment, or the relative degree of its appropriateness, is within the discretion of congress, and not to be determined by the judiciary. *Ibid.*

§ 222. Under the power to make all laws necessary, etc., congress has no authority to enact laws in furtherance even of a legitimate end merely because they are useful. There must be some adaptedness or appropriateness of the laws to carry into execution the powers created by

§§ 228-232. CONSTITUTION AND LAWS.—POWERS OF GOVERNMENT.

congress. But when a statute has proved effective in carrying into execution powers confessedly existing, it must have had some appropriateness to the execution of those powers. *Ibid.*

§ 223. The clause of the constitution which gives congress power "to make all laws which shall be necessary and proper to carry into execution" powers granted to it, does not mean that no law is authorized which is not indispensably necessary to give effect to the powers granted. Congress possesses the choice of means, and is empowered to use any means which are in fact conducive to the exercise of the power granted by the constitution. The necessity referred to in the clause of the constitution mentioned is not to be understood as an absolute one, but congress is to be allowed that discretion with respect to the means by which the powers conferred on it are to be carried into execution which will enable it to discharge the high duties assigned to it in the manner most beneficial to the people. If the end is legitimate, and within the scope of the constitution, then all means which are appropriate and are plainly adapted to that end, and are not prohibited, but are consistent with the letter and spirit of the constitution, are constitutional. If the particular law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, an inquiry by a court into the degree of its necessity would be to pass the line which circumscribes the judicial department and tread on legislative ground. So where the question was whether a law of congress which excluded certain matter from the mails was constitutional, it was held that whether certain things should be excluded or not is a matter for the sound discretion of congress under the constitution, and the discretion of a court cannot be substituted for the discretion of congress. *In re Jackson*, 14 Blatch., 251.

§ 224. Where rights are given or duties imposed on the government of the United States by the constitution, congress may enact the proper laws for their enforcement, though power to do so is not specifically enumerated among the powers of congress. The end being required, it is a just and necessary implication that the means to accomplish it are also given, or, in other words, that the power flows as a necessary means to accomplish the end. *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 618.

§ 225. *Treaties — Indians.*—A stipulation in a treaty with an Indian tribe, by which lands are ceded by the tribe to the United States, that the laws in force in the Indian country should continue in full force and effect as to that part of the territory ceded, is a proper exercise of the treaty-making power on the part of the United States, though the territory so ceded is within the limits of a state. *United States v. Forty-three Gallons of Whisky*, 8 Otto, 198.

§ 226. Neither the constitution of a state nor any act of its legislature can withdraw Indians from the influence of an act of congress which that body has the constitutional right to pass concerning them. *United States v. Holliday*, 3 Wall., 407.

§ 227. *Treaty-making power with Indians in a state.*—The extent to which the treaty-making power of congress may be exercised as to the Indian tribes residing beyond the limit of a state, is a matter resting wholly within the sound discretion of the legislature; but as to Indian tribes within the limits of a state, it seems that neither the treaty-making power nor the legislative power can be so exercised as to abridge the rights of the state. *United States v. Cisna*, 1 McL., 260. See *INDIANS*.

§ 228. A treaty is a part of the supreme law of the land, and a state can pass no law that conflicts with it. *Baker v. City of Portland*,\* 5 Saw., 566. See *TREATIES*.

§ 229. Where a treaty is entered into by the United States, which contains provisions repugnant to the statute of a state, such repugnant statute is thereby repealed. *Denn v. Harneden*, 1 Paine, 59.

§ 230. *War power of congress.*—The congress of the United States, to which is confided all the great powers essential to a perpetual Union—the power to make war, to suppress insurrection, to levy taxes, to make rules concerning captures on land and on sea—is not deprived of these powers when the necessity for their exercise is called out by domestic insurrection and internal civil war. *Tyler v. Defrees*, 11 Wall., 331. See *WAR*.

§ 231. The whole power of war being vested in congress, it may authorize general hostilities, in which the general rules of war apply, or partial hostilities, in which the rules of war apply only so far as they apply to the actual situation. *Talbot v. Seeman*, 1 Cr., 28.

§ 232. *Legalizing executive acts.*—Congress has constitutional power to legalize and confirm executive acts, proclamations and orders done and made for the public good, although they were not, when done, authorized by any existing law. Such legislation by congress may be made to operate retrospectively to confirm what may have been done under such proclamations and orders, so as to be binding upon the government in regard to contracts made and the persons with whom they were made. So the third section of the act of congress of August 6, 1861, legalizing the acts, proclamations and orders of the president, after the 4th day of March, 1861, respecting the army and navy, and calling out and regulating the militia and volunteers of the states, is constitutional and valid, and gives them the same



force and effect as if they had been issued and done under previous authority and direction of congress. *In re Stevens*,\* 24 Law Rep., 217.

§ 233. **Paper money.**—The acts of congress known as the Legal Tender Acts, making treasury notes a legal tender for payment of debts, being appropriate means for carrying into execution the legitimate powers of the government, and not being forbidden by the letter or spirit of the constitution, are constitutional. And this, whether applied to debts contracted before or after the passage of the acts. (CHASE, C. J., and CLIFFORD, FIELD and NELSON, JJ., dissent.) *Legal Tender Cases*, 12 Wall., 457; overruling *Hepburn v. Griswold*, 8 Wall., 608 (MILLER, SWAYNE and DAVIS, JJ., dissenting); *Railroad Co. v. Johnson*, 15 Wall., 195; *Latham v. United States*,\* 1 Ct. Cl., 151. Power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive; and hence the power conferred on congress to “coin money, regulate the value thereof, and of foreign coin,” contains no implication that nothing but that which is subject to coinage can ever be declared by law to be money, or to have the uses of money. On the contrary, if this grant of power, together with the prohibition on the states to coin money, emit bills of credit, or make anything but gold and silver a legal tender, raises any implications, they are implications of complete power in congress over the currency, as is incident to sovereignty in other nations. *Legal Tender Cases*, 12 Wall., 457. See MONEY.

§ 234. In inquiring into the power of congress to make treasury notes a legal tender for debts, the time when the act was passed and the circumstances in which the government then stood must be considered. *Ibid*.

§ 235. The argument that under the constitutional provision respecting the standard of weights and measures, and that conferring the power to coin money and regulate its value, there can be no uniform standard of weights without weight, or measure without length or space, or a standard of value made of that which itself has no value, does not affect the validity of the acts making paper money a legal tender, since the legal tender acts do not attempt to make paper a standard of value, but make the promises of the government equivalent to money. *Ibid*.

§ 236. **Confiscation of rebels' property.**—The act of congress of July 17, 1862, entitled “An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,” being intended, except the first four sections, not to reach any criminal personally, but to insure a speedy termination of the rebellion then present, which was a war, and which congress had recognized as a war, is held to be constitutional as an exercise of the war power of the government, and was not enacted by virtue of the sovereign rights of the government. (FIELD and CLIFFORD, JJ., dissent; holding that the provisions of the act are an exercise of the municipal, and not the war, power of the government, and not being in accordance with the constitution, are void.) *Miller v. United States*, 11 Wall., 263; *Tyler v. Defrees*, 11 Wall., 331; S. P., as applied to the Revolution, *Beach v. Woodhull*, Pet. C. C., 2. See WAR.

§ 237. **Suspension of writ of habeas corpus.**—The act of congress of March 3, 1863, authorizing the president to suspend the writ of *habeas corpus*, must be assumed to be constitutional. It is left entirely with congress to say when the necessity for such act arises, and the fact that they have seen fit to exercise the power is conclusive of the existence of the necessity. *McCall v. McDowell*, Deady, 248. As to Writ of *Habeas Corpus*, see WRITS.

§ 238. **Suspension of statute of limitations.**—The act of June 11, 1864, declaring “that whenever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or arrest of such person,—or whenever, after such action, civil or criminal, shall have accrued, such person cannot, by reason of such resistance of the laws, or such interruption of judicial proceedings, be served with process for the commencement of the action,—the time during which such person shall be beyond the reach of judicial process shall not be deemed or taken as any part of the time limited by law for the commencement of such action,” operates not only prospectively but also retrospectively. And the time elapsed, referred to, may be deducted from the time of limitation, whether before or after the passage of the act. It applies to cases in state courts and federal courts, and is constitutional. *Stewart v. Kahn*, 11 Wall., 493. See LIMITATIONS.

§ 239. **Authorizing secretary of treasury to make regulations.**—It is held that congress had constitutional power to authorize the secretary of the treasury to establish all such general and special regulations as might be necessary to carry into execution the purposes of an act providing that “no goods, wares or merchandise shall be taken into a state declared in insurrection, or transported therein, except to and from such places and to such monthly amounts as shall have been previously agreed upon in writing by the commanding general of

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the department in which such places are situated and an officer designated by the secretary of the treasury for that purpose." *United States v. The Schooner Francis Hatch*,\* 13 Am. L. Reg., 289.

§ 240. **Power to call out militia.**—The act of congress of 1795, empowering the president to call forth the militia of the states, whenever the United States shall be invaded, or in imminent danger of invasion from any foreign nation or Indian tribe, is within the constitutional power of congress. *Martin v. Mott*, 12 Wheat., 19. See WAR; also §§ 128, 129, *supra*.

§ 241. **Government of territory.**—The constitution of the United States provides that congress shall make all needful rules and regulations for the government of the territory of the United States, but this clause applies only to the territory then in existence, and has no operation as to territory ceded to the United States from foreign governments. This the United States holds as territory to be erected into states, and legislates for its government because that is a matter of necessity. This territory is held in trust by the United States for the benefit of the people, and congress is limited in its legislative action by all restrictions imposed upon it by the constitution in regard to the rights of persons and property. In such territory, therefore, congress cannot deprive a person of his property without due process of law and just compensation, and the right of property in slaves is as much within the protection of the law as the right in any other property. Therefore the act of congress of 1821, the "Missouri Compromise," prohibiting slavery in the territory acquired from France north of 36° 30' north latitude, was unconstitutional and void, and the removal of a slave into such territory did not entitle him to his freedom. (MCLEAN and CURTIS, JJ., dissent.) *Scott v. Sandford*, 19 How., 432. As to Territories, see STATES.

§ 242. **Suits against corporations in name of attorney-general — Vested rights — Due process.**—Congress has no authority to authorize the attorney-general to institute a suit in the name of the United States upon a cause of action belonging to a corporation chartered by them. Moneys recovered in such an action would belong to the United States, and to give effect to such an act would be to deprive one of his property without due process of law. Congress has no power thus to appropriate to itself property belonging to another. Congress would have an undoubted power to regulate the conduct of suits and prescribe the form of action, but it cannot, under the form of regulating the remedy, impair contracts, or dispose of the rights of property. *United States v. Union Pac. R'y Co.*, 11 Blatch., 392. (But see CORPORATIONS, §§ 1670-81.)

§ 243. **Appointment of officers.**—A clerk of court is one of the inferior officers which the constitution provides that congress may vest the appointment of in the president, the courts, or heads of departments, and the appointment of such a clerk is therefore properly vested by congress in the court of which he is clerk. *Ex parte Hennen*, 13 Pet., 257. See OFFICERS.

§ 244. **An act of congress vesting the appointment of deputy marshals and supervisors at congressional elections, to secure peace and honesty thereat, in the United States circuit court, is a legitimate exercise of the power vested in it by the provision in the constitution that "the congress may, by law, vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments."** *Ex parte Siebold*, 10 Otto, 871 (§§ 326-343).

§ 245. **Adopting state legislation.**—Whether congress can adopt state legislation upon any subject prospectively, *quare*. *In re Freeman*, 2 Curt., 495.

§ 246. **Resolutions of congress.**—A resolution of one house of congress can have no effect in coercing the action of a head of a department, for otherwise it would be possible for one house to nullify an act of congress. Nor would the resolution of both houses be of any effect. In no other way than by a constitutional law, enacted in the manner prescribed by the constitution, can the action of the executive be affected. It seems that if an act which requires any act by a head of a department ministerially receives the sanction of the president, it becomes binding, but is otherwise unconstitutional and void. Resolutions of Congress,\* 6 Op. Att'y Gen'l, 681.

§ 247. **A joint resolution of congress differs from an act only in form.** *Ibid*.

§ 248. **Power to acquire territory.**—It seems that inasmuch as the constitution has conferred absolutely on the government of the Union the powers of making war and making treaties, that government possesses the power of acquiring territory either by treaty or conquest. *American Ins. Co. v. Canter*, 1 Pet., 542. See STATES.

§ 249. **Sovereignty cannot be set up to defeat private rights.**—When the government, in the exercise of the rights and functions of a civil corporation, purchases lands to secure a debt, the accident of its sovereignty in other functions cannot be set up to destroy or affect the rights of persons claiming title to or a lien on the same lands. A bill may be brought to foreclose a mortgage on such land, to which the officers of the United States may be a party in her behalf. *Elliot v. Van Voorst*, 3 Wall. Jr., 299.

§ 250. **Power over public lands.**—Congress has the sole power to declare the dignity and effect of titles emanating from the United States. *Bagnell v. Broderick*, 13 Pet., 450. See LANDS.

§ 251. Under that clause of the constitution which confers upon congress power to dispose of the territory of the United States, the public lands may be leased as well as sold. *United States v. Gratiot*, 14 Pet., 537.

§ 252. That clause of the constitution which confers upon congress power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States, confers upon congress the exclusive authority to make any appropriation of public land for any purpose. *United States v. Fitzgerald*, 15 Pet., 421.

§ 253. It seems that within the limits of a state, congress can, in regard to the disposition of the public lands and their protection, make all needful rules and regulations. But beyond this it can exercise no act of sovereignty which it may not exercise in common over the lands of individuals. *United States v. Railroad Bridge Co.*, 6 McL., 532; *New Orleans v. United States*, 10 Pet., 737.

§ 254. Acts of congress do not shelter those who violate state laws.—The ordinances of a city in conflict with the laws of congress are void. But if there is no such conflict, an act of congress will not shelter one from a penalty under an ordinance. *United States v. Hart*, Pet. C. C., 390.

§ 255. Toll imposed on passengers carried in mail coaches on Cumberland road.—An act of the legislature of Ohio, imposing upon passengers, conveyed in mail coaches over that part of the Cumberland road within that state, a certain toll per head, while persons carried in other carriages passed free, in effect imposed a toll upon mail coaches, and was held void for the reason that it imposed on the United States a part of the burden of maintaining the road, which, by the terms of the compact made between the United States and Ohio, at the time that portion of the road was ceded to the state, was to be done by the latter. The fact that the toll was laid upon the passengers was an indirect imposition of a burden on the United States, as it must diminish the revenues of the mail contractors, and so increase the amount which the government would be obliged to pay. *Neil v. State of Ohio*, 8 How., 740; *Achison v. Huddleson*, 12 How., 297.

§ 256. Exempting persons from consequence of acts during rebellion.—The act of congress of March 2, 1867, is held to be constitutional, so far as it was intended to protect from civil process the officers and others who, as subordinates of the president, had striven to put down the rebellion, and whose acts had rendered them amenable to legal proceedings; and unconstitutional so far as it was intended to validate the punishment of offenders, which would otherwise be illegal. *In re Murphy*, 1 Woolw., 141. See WAR.

§ 257. Congress cannot impose duty on state officers.—The federal government, under the constitution, has no power to impose on a state officer, as such, any duty whatever and compel him to perform it. So the clause in the act of congress enacted to carry out the provisions of the constitution relating to the surrender of fugitives from justice, which declares that "it shall be the duty" of the governor of a state, on proper demand, to cause the person charged with the crime to be arrested, etc., is not mandatory and compulsory, but is simply declaratory of the moral and constitutional duty of the governor in the premises. And if the governor of a state shall refuse to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him. *Commonwealth of Kentucky v. Dennison*, 24 How., 107.

§ 258. **Patents.**—A special act of congress extending a patent for a fixed term is constitutional. *Bloomer v. Stolley*, 5 McL., 160; *Jordan v. Dobson*,\* 7 Phil., 542. See PATENTS.

§ 259. The power of congress to legislate upon the subject of patents is plenary by the terms of the constitution, and as there are no restraints on its exercise, there can be no limitation of the right of congress to modify the rights of a patentee, so long as it does not take away rights of property in existing patents. *McClurg v. Kingsland*, 1 How., 206.

§ 260. Congress has power to pass an act which operates retrospectively to give a patent for an invention, which, though made by the patentee, was in public use and enjoyed by the community at the time of the passage of the act. *Blanchard v. Sprague*, 2 Story, 164.

§ 261. A state law which provides that no person shall sell any patent right within the state until he shall have filed with the county clerk certain certificates and affidavits, and which provides a penalty for its infringement, is unconstitutional and void. The property in inventions exists by virtue of the laws of congress, and no state has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of congress on the subject, he has a right to go into the open market anywhere in the United States and sell his property. If this were not so, it is easy to see that a state could impose terms which would result in a prohibition of the sale of this species of property

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within its borders, and in this way nullify the laws of congress which regulate its transfer, and destroy the power conferred upon congress by the constitution. *Ex parte Robinson*, 2 Biss., 313.

§ 262. A state cannot, by legislation, interfere with patents granted under the constitution and laws of the United States, or impair their value; and a law making notes given in consideration of patent rights subject to defenses in the hands of *bona fide* purchasers, in derogation of the rules of the common law, is void. *Woollen v. Banker*,\* 2 Flip., 33.

§ 263. Trade marks.—The act of congress of August 14, 1876 (19 Statutes at Large, 141), punishing the counterfeiting of trade marks, is unconstitutional and void, as is also the other legislation of congress providing for the registration and exclusive use of trade marks. *Trade Mark Cases*, 15 Otto, 96; *Leidersdorf v. Flint*, 8 Biss., 328.

§ 264. An appropriation made to a person by act of congress is as authoritative as any other act of congress which makes the law of the land, and the amount is not to be anywhere questioned or reduced. *Syphax v. United States*,\* 7 Ct. Cl., 530.

§ 265. During the revolutionary war the supreme power and authority was vested in congress and nowhere else. *Penhallow v. Doane*, 3 Dal., 80.

§ 266. Regulating sale of oils — Police power.—Section 29 of the act of congress of March 2, 1867, declaring "that no person shall mix for sale naphtha and illuminating oils, or shall knowingly sell or keep for sale, or offer for sale, such mixture, or shall sell or offer for sale oil made from petroleum for illuminating purposes, inflammable at less temperature or first test than one hundred and ten degrees Fahrenheit; and any person so doing shall be held guilty of a misdemeanor," etc., cannot be considered as an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes. It is a police regulation relating to the internal trade of the states, and as such can have no constitutional operation except in places under the exclusive control of the legislative authority of congress. *Filor v. United States*,\* 9 Wall., 41.

§ 267. Rights of new states.—An act of congress which pretends of right, and without consent or compact, to impose on the municipal power of any new state or states limitations and restrictions not imposed on all, is contrary to the fundamental condition of the confederation, according to which there is to be equality of right between the old and new states "in all respects whatever." *Eminent Domain of the States*,\* 7 Op. Att'y Gen'l, 576.

§ 268. The sovereignty and jurisdiction of new states admitted into the Union are not governed by the common law of England as it was in force in the colonies before the Revolution, but as modified by our own institutions. *Pollard v. Hagan*, 3 How., 229. See STATES.

§ 269. On the admission of Alabama into the Union she succeeded to all the rights of sovereignty, jurisdiction and eminent domain possessed by Georgia at the time of the latter's cession of her territory to the United States, except only the right of the United States to the waste and unoccupied lands within the new state, and the state became thereupon entitled to the soil under the navigable waters of the state not previously granted, and no action of the United States concerning any part thereof was of any force or effect. *Ibid.*

§ 270. Where a naval or military reservation has been created in a territory, the jurisdiction of a state which includes it attaches upon the admission of such state into the Union, if nothing is specified in the act of admission as to the exercise of such jurisdiction. *Eminent Domain of the States*,\* 7 Op. Att'y Gen'l, 571.

§ 271. On the passage of the act of congress admitting Texas into the Union, and acts of congress establishing the revenue and judicial system therein, the old system of laws was abrogated entirely so far as it conflicted with the laws of the United States. *Calkin v. Cocke*, 14 How., 235.

§ 272. The admission of Texas into the Union had no effect to annul limitation laws enacted by the republic as to actions on judgments rendered in the United States. After such admission the authenticity of a judgment in another state, and its effect, were to be tested by the constitution of the United States and the acts of congress, and under that constitution each state has a right to legislate upon the remedy in suits on judgments of other states, exclusive of all interference with their merits. *Bacon v. Howard*, 20 How., 25.

§ 273. On the admission of the territory of Florida into the Union, the territorial government was displaced and every part of it abrogated, and no jurisdiction existed in it except that derived from the state authority and from the federal constitution and laws of congress; and especially no jurisdiction in federal cases existed until congress extended the jurisdiction of the federal courts over it. So, though the courts of the territory were to be continued as the courts of the state, still those courts, being state courts, could exercise no control over federal cases pending in them at the time of the admission of the territory into the Union. *Benner v. Porter*, 9 How., 242.

§ 274. Admission of West Virginia.—The act of congress admitting the state of West Virginia into the Union is held to be a sufficient consent by congress, under the constitu-

tion, to the agreement between Virginia and West Virginia under which the latter state was formed. Such consent need not be given in the form of an express and formal statement of every proposition of the agreement and of the consent of congress thereto. *Virginia v. West Virginia*, 11 Wall., 39.

§ 275. Implied powers of the states to enforce rights.— Where the constitution prohibits states from impairing a right, it, by implication, gives the states power to pass laws to support and enforce it. (Per *TANEY*, C. J.) *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 627.

§ 276. Suits by United States in state courts.— The United States are a body corporate, having a capacity to contract, to take and hold property, and in this respect stand upon the same footing with other corporate bodies; and if they will prosecute their suits in a state court and avail themselves of state laws for this purpose, it is not perceived that any good reason can be given why such state process as they use for the purpose of enforcing their right should not be subject to the state law. *Stearns v. United States*, 2 Paine, 312. See COURTS.

§ 277. Declaration of independence— Effect on sovereignty of states.— By the declaration of independence the united colonies did not become free in a collective capacity merely, but each colony became a sovereign and independent state; that is, each had a right to govern itself by its own authority and its own laws, without any control from any other power on earth. *Ware v. Hylton*, 3 Dal., 224.

§ 278. State and federal governments not foreign to each other.— The governments of the several states and of the United States are not to be considered as foreign to each other. The laws of the United States operate on and bind the same people as the government and laws of the several states. The laws of the various states may be considered as foreign to each other, but the laws of the United States and of each state are a part of the same system. *Stearns v. United States*, 2 Paine, 310.

§ 279. The duty of allegiance to the United States is co-extensive with the constitutional jurisdiction of its government, and is to that extent independent of, and paramount to, any duty of allegiance to a particular state. The duty of allegiance to the United States is paramount so long as the United States is able to maintain peace, and to extend to its citizens the protection to which allegiance to it entitles them. *United States v. Greiner*,\* 24 Law Rep., 99.

§ 280. Relations of the states to each other.— For all national purposes embraced by the federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign and independent of each other. *Buckner v. Finley*, 3 Pet., 590; *Bank of United States v. Daniel*, 12 Pet., 54. See STATES.

§ 281. It was not the design of the framers of the constitution, nor is it the policy of the government and of the people of the United States, that any state shall be permitted to place restrictions between the states of the Union. *Baltimore v. P. & C. Railroad Co.*,\* 13 Pittsb. L. J., 576.

§ 282. Though acts of a state government which are temporary in their nature, and simply affect individuals, are binding upon the residents of territory under its actual, though wrongful, control, still a grant of land by such state, if without its actual borders, is inoperative and invalid, though it may have been under the control and government of the state at the time of the grant; and for that state to admit, in a compact with another state, that the lands so granted are not within its boundaries, is not to impair the obligation of a contract. *Fleegeer v. Pool*, 1 McL., 190.

§ 283. Except as restrained and limited by the constitution of the United States, each state is a separate and independent sovereignty. No state, therefore, can exercise direct jurisdiction and authority over persons or property not within its territory. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. So it is laid down by jurists as an elementary principle that the laws of one state have no operation outside of its territory, except so far as it is allowed by comity, and no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decision. *Pennoyer v. Neff*, 5 Otto, 722. In order to maintain a ferry across a river between two states, the concurrent action of the two states is not necessary. *Conway v. Taylor*, 1 Black, 639.

§ 284. Every state is perfectly competent, and has the exclusive right, to prescribe the remedies in its own judicial tribunals, to limit the time as well as the mode of redress, and to deny jurisdiction over cases which its own policy and its own institutions either prohibit or discountenance. *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 614.

§ 285. In administering justice, to enforce contracts and judgments, the states of this Union act independently of each other, and the courts of each are governed by their own municipal laws and regulations in the administration of justice, unless they are controlled by the constitution of the United States, or by laws enacted under its authority. *Bank of Alabama v. Dalton*, 9 How., 527.

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§ 286. — extradition.— The clause of the constitution of the United States which provides that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime," applies to and embraces every act forbidden and made punishable by a law of the state, whether a crime at common law, or in the state to which the fugitive has fled, or not. The word "demand" implies that the right to have such fugitives surrendered up is an absolute right, and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled. *Commonwealth of Kentucky v. Dennison*, 24 How., 98. See CRIMES.

§ 287. That clause of the constitution which requires the various states to surrender up fugitives from justice from other states implies that the mode in which it is to be executed shall be prescribed by congress; and as in our government the executive is always to be subjected to the judicial department, the governor of the state on whom demand is made can act only when the demand is duly founded on judicial proceedings, and when called upon to render his aid, he should be satisfied that the fugitive has been duly and judicially charged with the crime for which his return is requested. *Ibid.*

§ 288. Reserved powers of the states.— It seems that the federal government, though limited in its powers, is supreme within its field of action, and its laws, when passed in pursuance of the constitution, form the supreme law of the land. On the other hand, the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. The exclusive powers possessed by the states cannot be exercised by the federal government; and that the United States and the states, in these respects, though exercising jurisdiction within the same territorial limits, are separate and independent sovereignties, acting separately and independently of each other within their respective spheres, just as fully as if the line of division was traced by landmarks and monuments visible to the eye. *Sweatt v. Boston, etc., R'y Co.*, 3 Cliff., 352; *Ableman v. Booth*, 21 How., 506; *Latham v. United States*,\* 1 Ct. Cl., 163; *United States v. Bailey*, 1 McL., 236; *United States v. Cisna*, 1 McL., 257; *United States v. Brigantine William*,\* 2 Hall L. J., 277; *State of Rhode Island v. State of Massachusetts*, 12 Pet., 657. See STATES.

§ 289. The right of the United States to exercise control over a public quay in Louisiana can only exist by virtue of the constitution, though the quay was dedicated before the cession of the land to the United States. And as all powers which appertain to sovereignty, and which have not been delegated to the United States, remain in the several states, the right to regulate such quay is in the state alone. *New Orleans v. United States*, 10 Pet., 737.

§ 290. In construing the constitution as to grants of power to the United States, and the restrictions upon the states, the supreme court of the United States has ever held, that an exception in any particular case presupposes that those matters which are not excepted are embraced within the grant or prohibition; and has laid it down as a general rule, that where no exception is made in terms, none will be made by mere implication. *State of Rhode Island v. State of Massachusetts*, 12 Pet., 722.

§ 291. Prerogative powers belonging by the common law to the sovereign as *parens patriæ*, belong, in the United States, to the separate states, and cannot, by virtue of any state law, be exercised by the federal courts. (Per TANEY, C. J.) *Fontain v. Ravenel*, 17 How., 393.

§ 292. The states still retain the attributes of sovereignty except so far as they have surrendered them to the federal government; and they have never surrendered the right to determine the qualifications for office and the conditions upon which citizens may pursue their various callings within their jurisdiction. *Cummings v. State of Missouri*, 4 Wall., 277 (§§ 608-618).

§ 293. Conflict of state and federal laws.— Where the nature of a provision of the constitution and the objects to be attained by it require that it should be controlled by one will, the states cannot legislate on the subject. And any state law interfering with the exercise of this right by congress is unconstitutional and void. *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 624. See XIII, 7.

§ 294. Whether the constitution of a state or an act of its legislature conflicts with the constitution or laws of the United States is a federal question, the ultimate and final decision of which, by the constitution and laws of congress, is vested in the supreme court of the United States, whose decision is binding on all other courts, both federal and state. *United States v. Jefferson County*, 5 Dill., 317.

§ 295. The law of congress upon a subject within its jurisdiction is the supreme law of the land; but in order that a state law which was enacted by virtue of its reserved power should be void as being in conflict with it, the repugnance or conflict must be so direct and positive that the two acts cannot be reconciled or consistently stand together, and also that the act of

congress should be clearly within its authority. *Sinnot v. Commissioners of Pilotage of Mobile*, 22 How., 243; *Austin v. The Aldermen*, 7 Wall., 694.

§ 296. No power can exist in a state the exercise of which might tend to defeat the purposes for which the federal government was established. *Crandall v. Nevada*, 6 Wall., 85 (§§ 1269-73).

§ 297. Where congress has failed to act in reference to a matter over which it has control, the states may act if not directly inhibited; but when congress acts, its act is exclusive. *United States v. Quinn*,\* 8 Blatch., 48.

§ 298. A state cannot exercise its police power in regard to a subject-matter which has been confided exclusively to the discretion of congress. *Henderson v. Mayor of New York*, 2 Otto, 259 (§§ 1336-42). See § 266.

§ 299. When an unqualified power is given to the general government, the exercise of which by the state governments would be inconsistent with the express grant, the whole of the power is granted, and consequently vests exclusively in the general government. *Golden v. Prince*,\* 3 Wash., 313.

§ 300. State may legislate when congress does not.—Where congress has not legislated upon a subject-matter within its jurisdiction, it seems that state legislation upon the same subject-matter is not unconstitutional. *The Canal-boat Ann Ryan*,\* 7 Ben., 23. *Contra*, *Golden v. Prince*,\* 3 Wash., 313.

§ 301. Where congress legislates concerning a subject-matter within its constitutional powers, such legislation supersedes all state legislation on the same subject, and, by necessary implication, prohibits it. When congress has exercised such power, state legislatures have no right to interfere, and, as it were, by way of complement to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 617; *The Celestine*, 1 Biss., 6.

§ 302. Judicial powers.—The constitution does not prohibit the legislature of a state from exercising judicial powers. *Satterlee v. Matthewson*, 2 Pet., 390 (§§ 1630-35).

§ 303. Territory to be included in a city.—What portions of a state shall be within the limits of a city and be governed by its authorities and its laws is a proper subject of legislation. *Kelly v. Pittsburgh*, 14 Otto, 78 (§§ 695-700).

§ 304. Exclusive power of the states in local matters.—The several original states, from the time they declared themselves independent, became entitled, at least so far as regards their municipal regulations, to all the rights and powers of sovereign states, and such powers were not derived from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it. So a law of such a state, passed after the declaration of independence, declaring all persons residing therein to be citizens and owing allegiance thereto, is binding upon all residents. *M'Ilvaine v. Cox*, 4 Cr., 212; *City of New York v. Milne*, 11 Pet., 103 (§§ 1274-83).

§ 305. Shores and beds of navigable waters.—The right of eminent domain over the shores and the soils under the navigable waters for all municipal purposes belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. *Pollard v. Hagan*, 3 How., 230; *Griffing v. Gibb*, McAl., 224.

§ 306. The shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states respectively, and new states have the same rights, sovereignty and jurisdiction over this subject as the original states. *Pollard v. Hagan*, 3 How., 230.

§ 307. The right of the United States to the public lands, and the power of congress to make all needful rules and regulations for the sale and disposition thereof, confers no power on congress to grant the soil under the navigable waters of a state below high water mark. *Ibid*.

§ 308. The right of states to grant licenses to maintain ferries across the navigable waters of the United States is one of the reserved powers of the states, not delegated to the general government. *Conway v. Taylor*, 1 Black, 635.

§ 309. Power of states to regulate contracts and civil status.—Except as restrained and limited by the constitution of the United States, the several states exercise and possess the authority of independent states. As such independent states, every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every state has the power to determine for itself the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising out of them, and the mode in which their validity shall be determined and their obligations enforced. They may regulate, also, the manner and conditions upon which property situated within such territory, both real and personal, may be acquired, enjoyed and transferred. *Pennoyer v. Neff*, 5 Otto, 722; *Strader v. Graham*, 10 How., 82.

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§ 310. Marriage in the United States is not a federal question, but is governed by each state for itself. Celebration of Marriages by Consuls,\* 7 Op. Att'y Gen'l, 23.

§ 311. State may lay out road through public lands.—The legislature of a state may authorize and lay out a rail or turnpike road through the lands of the United States within its territorial limits. The proprietorship of lands in a state by the general government cannot enlarge its sovereignty or restrict that of the state. This sovereignty extends to the state limits over the territory of the state, subject only to the proprietary right of the lands owned by the federal government, and the right to protect and dispose of such lands as it shall deem proper. The state has the right to provide for and promote intercourse between its citizens by the establishment of roads of all kinds, in the discretion of the legislature. The right of eminent domain appertains to a state, and may be exercised free from the restraints of the federal constitution. *United States v. Railroad Bridge Co.*, 6 McL., 531.

§ 312. Power of state to authorize aid to railroads.—The construction of a railroad, although owned by a private corporation, is a matter of public concern, and its uses are so far public, that the legislature of a state, unless restrained by the express provisions of the state constitution, may authorize a county to make a donation of its warrants or bonds to aid in such an enterprise, and to levy taxes for the payment of such bonds or warrants. *Olcott v. The Supervisors*,\* 16 Wall., 678; *Township of Pine Grove v. Talcott*, 19 Wall., 666; *Town of Queensbury v. Culver*, 19 Wall., 83; *St. Joseph Township v. Rogers*, 16 Wall., 644. *Contra* (CLIFFORD, J., dissenting), *Loan Association v. Topeka*, 20 Wall., 655. See BONDS, B.

§ 313. State bankrupt laws.—The exercise of the power to pass bankrupt laws, by the state governments, is incompatible with the grant of power to congress to pass uniform laws on the same subject. If congress does not exercise the power, no right to pass such laws results to the state governments. The failure by congress to pass such a law amounts to a declaration that none should exist. *Golden v. Prince*,\* 3 Wash., 813. See *infra*, X, 3.

§ 314. Regulating occupations.—An ordinance requiring for the issue of a license to establish, maintain or carry on a laundry within the limits mentioned, the recommendation of twelve citizens and tax-payers in the block in which the laundry is to be established, maintained or carried on, is unauthorized by the power, given to the body passing it, "to prohibit and suppress, or exclude from certain limits, or to regulate, all occupations, houses, places, pastimes, amusements, exhibitions and practices, which are against good morals, contrary to public order and decency, or dangerous to the public safety." And it may be doubted whether such an ordinance could be authorized by any legislative body under our form of government. *The Laundry Ordinance Case*,\* 7 Saw., 526.

§ 315. Rights of Chinese—Police regulations.—Chinese, resident here before the passage of the recent act of congress restricting Chinese immigration, have, under the Burlingame treaty, the right to remain and follow any of the lawful, ordinary trades and pursuits of life, without let or hindrance from the state, or any of its subordinate municipal bodies, except such as may arise from the enforcement of equal and impartial laws. *Ibid.* See §§ 266, 298.

§ 316. The Burlingame treaty is not violated by the act of the legislature of California providing that no body shall be exhumed, and no exhumed body carried through the streets or highways, except upon a permit from the health officer at the cost of \$10, this sum being charged to defray the expense of inspection and supervision. The treaty does not prevent the application of the act to the removal of Chinese bodies for transportation to China. *In re Wong Yung Qu*,\* 6 Saw., 442.

§ 317. The right to reside in this country, guarantied by the Burlingame treaty, implies the right to work for a living. The act of the legislature of Oregon of October 16, 1872, providing that "it shall be unlawful to employ any Chinese laborers on any street, or part of a street, of any city or incorporated town of this state, or on any public works or public improvements of any character, except as a punishment for crime," is void as in conflict with the provisions of the treaty, the fifth article of which recognizes "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration and emigration of their citizens and subjects respectively from one country to the other, for the purpose of curiosity, trade, or as permanent residents," and the sixth article of which declares that "Chinese subjects visiting and residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may be then enjoyed by the citizens or subjects of the most favored nation." *Baker v. City of Portland*,\* 5 Saw., 566.

§ 318. The police power of the state extends to all matters relating to the internal improvement of the state, and the administration of its laws, which have not been surrendered to the general government, and embraces regulations affecting the health, good order, morals, peace and safety of society. This power may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming



from other countries. The state may entirely exclude convicts, lepers and persons inflicted with incurable disease; may refuse admission to paupers, idiots, lunatics and others who, from physical causes, may likely become a charge upon the public, until security is afforded that they will not become such a charge. But the extent of the power of the state to exclude a foreigner from its territory is limited by the right of self-defense. Whatever, outside of the legitimate exercise of this right, affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the federal government. The act of the state of California requiring the commissioner of immigration to satisfy himself whether or not any passenger who shall arrive in the state in vessels from any foreign port or place (who is not a citizen of the United States), belongs to any of certain specified classes, including "lewd or debauched women," and declaring that no person who shall belong to any of these classes, or who possesses any of the specified infirmities or vices, shall be permitted to land, unless the master, owner or consignee of the vessel shall give bond to the people of the state that such person will not become a charge upon the public, no difference being made between the woman whose lewdness consists in private unlawful indulgence and the woman who publicly prostitutes her person for hire, or the woman debauched by intemperance in food and drink, or debauched by the loss of her chastity, is not only unconstitutional, but, when applied to citizens of China, is in conflict with the treaty between the United States and China, adopted July 28, 1868. *In re Ah Fong*,\* 3 Saw., 144. See §§ 266, 298, 315.

§ 819. **Power to suppress insurrection.**—A state may use its power to put down an armed insurrection too strong to be controlled by the civil authority. The power is necessary to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of the Union as to any other government. It rests with the state to determine what force the exigency demands, and if, in its opinion, a declaration of martial law is essential for the suppression of the insurrection, a law declaring martial law is constitutional and valid. (WOODBURY, J., dissenting.) *Luther v. Borden*, 7 How., 45.

§ 820. **Compact between states.**—Where private rights are injured by a compact between states, entered into with assent of congress, the injured parties must look to their respective states for redress. To allow persons to object to the treaty because their rights were not suitably protected would be to abrogate the treaty-making power altogether. *Fleeger v. Pool*, 1 McL., 191. See § 190.

## 2. Congressional Elections.

[See ELECTIONS.]

**SUMMARY**—*Constitutional provision*, § 821.—*Acts of congress valid*, § 822.—*May act in conjunction with states*, § 823.—*Power to provide for appointment of supervisors and deputy marshals*, §§ 822, 824.—*Power of marshals to arrest*, § 825.

§ 821. The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators. Const., art. I, sec. 4. See § 354.

§ 822. The acts of congress punishing officers of election for violation of their duty at elections for representatives in congress, and authorizing the appointment of supervisors by the circuit courts, and of special deputy marshals by the marshal, are constitutional. *Ex parte Siebold*, §§ 326-343; *Ex parte Clarke*, §§ 344-348. See § 360.

§ 823. It is not necessary that congress should assume entire control of elections of representatives, but in the exercise of its power to make regulations it may act in conjunction with the states, and any regulations it may make will supersede those of the states. *Ibid*.

§ 824. Congress has power to provide for the appointment of deputy marshals. *In re Engle*, §§ 349-353. See § 360.

§ 825. And it was held that deputy marshals were justified in arresting two men, one of whom was intoxicated and noisy, and the other one, a colored man, was distributing to colored voters, many of whom could not read, tickets containing the names of democratic candidates, but purporting to be republican tickets—having republican devices thereon, such as pictures of Presidents Lincoln and Grant. *Ibid*. See § 1601.

[NOTES.—See §§ 354-364.]

## EX PARTE SIEBOLD.

(10 Otto, 371-399. 1879.)

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—The petitioners in this case, Albert Siebold, Walter Tucker, Martin C. Burns, Lewis Coleman and Henry Bowers, were judges of election at different voting precincts in the city of Baltimore, at the election held in that city, and in the state of Maryland, on the 5th day of November, 1878, at which representatives to the forty-sixth congress were voted for.

At the November term of the circuit court of the United States for the district of Maryland, an indictment against each of the petitioners was found in said court, for offenses alleged to have been committed by them respectively at their respective precincts whilst being such judges of election; upon which indictments they were severally tried, convicted and sentenced by said court to fine and imprisonment. They now apply to this court for a writ of *habeas corpus* to be relieved from imprisonment. Before making this application, each petitioner, in the month of September last, presented a separate petition to the chief justice of this court (within whose circuit Baltimore is situated), at Lynn, in the state of Connecticut, where he then was, praying for a like *habeas corpus* to be relieved from the same imprisonment. The chief justice thereupon made an order that the said marshal and warden should show cause before him, on the second Tuesday of October, in the city of Washington, why such writs should not issue. That being the first day of the present term of this court, at the instance of the chief justice the present application was made to the court by a new petition addressed thereto, and the petitions and papers which had been presented to the chief justice were by consent made a part of the case. The records of the several indictments and proceedings thereon were annexed to the respective original petitions, and are before us. These indictments were framed partly under section 5515 and partly under section 5522 of the Revised Statutes of the United States; and the principal questions raised by the application are, whether those sections, and certain sections of the title of the Revised Statutes relating to the elective franchise, which they are intended to enforce, are within the constitutional power of congress to enact. If they are not, then it is contended that the circuit court has no jurisdiction of the cases, and that the convictions and sentences of imprisonment of the several petitioners were illegal and void.

§ 326. *This court is authorized to exercise appellate jurisdiction by writ of habeas corpus.*

The jurisdiction of this court to hear the case is the first point to be examined. The question is whether a party imprisoned under a sentence of a United States court, upon conviction of a crime created by and indictable under an unconstitutional act of congress, may be discharged from imprisonment by this court on *habeas corpus*, although it has no appellate jurisdiction by writ of error over the judgment. It is objected that the case is one of original and not appellate jurisdiction, and, therefore, not within the jurisdiction of this court. But we are clearly of opinion that it is appellate in its character. It requires us to revise the act of the circuit court in making the warrants of commitment upon the convictions referred to. This, according to all the decisions, is an exercise of appellate power. *Ex parte* Burford, 3 Cranch, 448; *Ex parte* Bollman and Swartwout, 4 id., 100, 101; *Ex parte* Yerger, 8 Wall., 98. That this court is authorized to exercise appellate jurisdiction by *habeas*

*corpus* directly is a position sustained by abundant authority. It has general power to issue the writ, subject to the constitutional limitations of its jurisdiction, which are, that it can only exercise original jurisdiction in cases affecting ambassadors, public ministers and consuls, and cases in which a state is a party; but has appellate jurisdiction in all other cases of federal cognizance, "with such exceptions and under such regulations as congress shall make."

Having this general power to issue the writ, the court may issue it in the exercise of original jurisdiction where it has original jurisdiction; and may issue it in the exercise of appellate jurisdiction where it has such jurisdiction, which is in all cases not prohibited by law except those in which it has original jurisdiction only. *Ex parte Bollman and Swartwout, supra; Ex parte Watkins*, 3 Pet., 202; 7 id., 568; *Ex parte Wells*, 18 How., 307, 328; *Ableman v. Booth*, 21 id., 506; *Ex parte Yerger*, 8 Wall., 85.

§ 327. *For what a writ of habeas corpus will lie.*

There are other limitations of the jurisdiction, however, arising from the nature and objects of the writ itself, as defined by the common law, from which its name and incidents are derived. It cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a *habeas corpus*, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust, the appellate court may, perhaps, in its discretion, give immediate relief on *habeas corpus*, and thus save the party the delay and expense of a writ of error. *Bac. Abr., Hab. Corp., B. 13; Bethel's Case*, Salk., 348; 5 Mod., 19. But the general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by *habeas corpus*.

The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void. This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of *Ex parte Lange*, 18 Wall., 163, and *Ex parte Parks*, 93 U. S., 18. In the former case, we held that the judgment was void, and released the petitioner accordingly; in the latter, we held that the judgment, whether erroneous or not, was not void, because the court had jurisdiction of the cause; and we refused to interfere.

Chief Justice Abbot, in *Rex v. Suddis*, 1 East, 306, said: "It is a general rule, that, where a person has been committed under the judgment of another court of competent criminal jurisdiction, this court [the king's bench] cannot review the sentence upon a return to a *habeas corpus*. In such cases, this court is not a court of appeal." It is stated, however, in *Bacon's Abridgment*, probably in the words of Chief Baron Gilbert, that "if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge." *Bac. Abr., Hab. Corp., B. 10*. The latter part of this rule, when applied to imprisonment under conviction and sentence, is confined to cases of clear and manifest want of criminality in the matter charged, such as in effect to render

the proceedings void. The authority usually cited under this head is Bushel's Case, decided in 1670. There, twelve jurymen had been convicted in the oyer and terminer for rendering a verdict (against the charge of the court) acquitting William Penn and others, who were charged with meeting in conventicle. Being imprisoned for refusing to pay their fines, they applied to the court of common pleas for a *habeas corpus*; and though the court, having no jurisdiction in criminal matters, hesitated to grant the writ, yet, having granted it, they discharged the prisoners, on the ground that their conviction was void, inasmuch as jurymen cannot be indicted for rendering any verdict they choose. The opinion of Chief Justice Vaughan in the case has rarely been excelled for judicial eloquence. T. Jones, 13; S. C., Vaughan, 135; S. C., 6 Howell's State Trials, 999.

§ 328. *Where the validity of a judgment is assailed on the ground that it is founded on an unconstitutional law, this court can interfere by habeas corpus.*

Without attempting to decide how far this case may be regarded as law for the guidance of this court, we are clearly of opinion that the question raised in the cases before us is proper for consideration on *habeas corpus*. The validity of the judgments is assailed on the ground that the acts of congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so because, if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws.

We proceed, therefore, to examine the cases on their merits.

The indictments commence with an introductory statement that, on the 5th of November, 1878, at the fourth [or other] congressional district of the state of Maryland, a lawful election was held, whereat a representative for that congressional district in the forty-sixth congress of the United States was voted for; that a certain person [naming him] was then and there a supervisor of election of the United States, duly appointed by the circuit court aforesaid, pursuant to section 2012 of the Revised Statutes, for the third [or other] voting precinct of the fifteenth [or other] ward of the city of Baltimore, in the said congressional district, for and in respect of the election aforesaid, thereat; that a certain person [naming him] was then and there a special deputy marshal of the United States, duly appointed by the United States marshal for the Maryland district, pursuant to section 2021 of the Revised Statutes, and assigned for such duty as is provided by that and the following section, to the said precinct of said ward of said city, at the congressional election aforesaid, thereat. Then come the various counts.

The petitioner, Bowers, was convicted on the second count of the indictment against him, which was as follows: "That the said Henry Bowers, afterwards,

to wit, on the day and year aforesaid, at the said voting precinct within the district aforesaid, unlawfully did obstruct, hinder, and, by the use of his power and authority as such judge as aforesaid (which judge he then and there was), interfere with and prevent the *said supervisor of election* in the performance of a certain duty in respect to said election required of him, and which he was then and there authorized to perform by the law of the United States, in such case made and provided, to wit, that of personally inspecting and scrutinizing, at the beginning of said day of election, and of the said election, the manner in which the voting was done at the said poll of election, by examining and seeing whether the ballot first voted at said poll of election was put and placed in a ballot-box containing no ballots whatever, contrary to section 5522 of said statutes, and against the peace, government and dignity of the United States."

Tucker, who was indicted jointly with one Gude, was convicted upon the second and fifth counts of the indictment against them, which were as follows: "(2d) That the said Justus J. Gude and the said Walter Tucker afterwards, to wit, on the day and year aforesaid, at the said voting precinct of said ward of said city, unlawfully and by exercise of their power and authority as such judges as aforesaid, did prevent and hinder the free attendance and presence of the said James N. Schofield (who was *then and there such deputy marshal* as aforesaid, in the due execution of his said office), at the poll of said election of and for the said voting precinct, and the full and free access of the same deputy marshal to the same poll of election, contrary to the said last-mentioned section of said statutes (sec. 5522), and against the peace, government and dignity of the United States.

"(5th) That the said Justus J. Gude and the said Walter Tucker, on the day and year aforesaid, at the precinct aforesaid, within the district aforesaid (they being then and there such officers of said election as aforesaid), knowingly and unlawfully at the said election did a certain act, not then and there authorized by any law of the state of Maryland, and not authorized then and there by any law of the United States, by then and there fraudulently and clandestinely putting and placing in the ballot-box of the said precinct twenty (and more) ballots (within the intent and meaning of sec. 5514 of said statutes), which had not been voted at said election in said precinct before the ballots, then and there lawfully deposited in the same ballot-box, had been counted, with intent thereby to affect said election and the result thereof, contrary to section 5515 of said statutes, and against the peace, government and dignity of the United States."

This charge, it will be observed, is for the offense commonly known as "stuffing the ballot-box." The counts on which the petitioners, Burns and Coleman, were convicted were similar to those above specified. Burns was charged with refusing to allow the supervisor of elections to inspect the ballot-box, or even to enter the room where the polls were held, and with violently resisting the deputy marshal who attempted to arrest him, as required by section 2022 of the Revised Statutes. The charges against Coleman were similar to those against Burns, with the addition of a charge for stuffing the ballot-box. Siebold was only convicted on one count of the indictment against him, which was likewise a charge of stuffing the ballot-box.

§ 329. *Provisions of the elective franchise statutes, May 31, 1870.*

The sections of the law on which these indictments are founded, and the validity of which is sought to be impeached for unconstitutionality, are summed

up by the counsel of the petitioners in their brief as follows (omitting the comments thereon):

The counsel say —

“These cases involve the question of the constitutionality of certain sections of title XXVI of the Revised Statutes, entitled the ‘Elective Franchise.’

“Sec. 2011. The judge of the circuit court of the United States, wherein any city or town having upwards of twenty thousand inhabitants is situated, upon being informed by two citizens thereof prior to any registration of voters for, or any election at which, a representative or delegate in congress is to be voted for, that it is their desire to have *such registration or election guarded and scrutinized*, shall open the circuit court at the most convenient point in the circuit.

“Sec. 2012. The judge shall appoint two supervisors of election for every election district in such city or town.

“Sec. 2016. The supervisors are authorized and required to attend all times and places fixed for registration of voters; to challenge such as they deem proper; to cause such names to be registered as they may think proper to be so marked; to inspect and scrutinize such register of voters, and for purposes of identification to affix their signatures to each page of the original list.

“Sec. 2017. The supervisors are required to attend the times and places for holding elections of representatives or delegates in congress, and of counting the votes cast; to challenge any vote, the legality of which they may doubt; to be present continually where the ballot-boxes are kept until every vote cast has been counted and the proper returns made, required under any law of the United States, or any state, territorial or municipal law; and to personally inspect and scrutinize, at any and all times on the day of election, the manner in which the poll-books, registry lists and tallies are kept, whether the same are required by any law of the United States, or any state, territorial or municipal laws.

“Section 2021 requires the marshal, whenever any election at which representatives or delegates in congress are to be chosen, upon application by two citizens in cities or towns of more than twenty thousand inhabitants, to appoint special deputy marshals, whose duty it shall be to aid and assist the supervisors in the discharge of their duties, and attend with them at all registrations of voters or election at which representatives to congress may be voted for.

“Section 2022 requires the marshal and his general and special deputies to keep the peace and protect the supervisors in the discharge of their duties; preserve order at such place of registration and at such polls; prevent fraudulent registration and voting, or fraudulent conduct on the part of any officer of election, and immediately to arrest any person who commits, or attempts to commit, any of the offenses prohibited herein, or any offense against the laws of the United States.”

The counsel then refer to and summarize sections 5514, 5515 and 5522 of the Revised Statutes. Section 5514 merely relates to a question of evidence, and need not be copied. Sections 5515 and 5522, being those upon which the indictments are directly framed, are proper to be set out in full. They are as follows:

“Sec. 5515. Every officer of an election at which any representative or delegate in congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any state, territorial, district or municipal law or author-

ity, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such representative or delegate; or who withholds, conceals or destroys any certificate of record so required by law respecting the election of any such representative or delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, procures or advises any voter, person or officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in section 5511."

"Sec. 5522. Every person, whether with or without any authority, power or process, or pretended authority, power or process, of any state, territory or municipality, who obstructs, hinders, assaults, or by bribes, solicitation or otherwise, interferes with or prevents the supervisors of election, or either of them, or the marshal or his general or special deputies, or either of them, in the performance of any duty required of them, or either of them, or which he or they, or either of them, may be authorized to perform by any law of the United States, in the execution of process or otherwise, or who, by any of the means before mentioned, hinders or prevents the free attendance and presence at such places of registration, or at such polls of election, or full and free access and egress to and from any such place of registration or poll of election, or in going to and from any such place of registration or poll of election, or to and from any room where any such registration or election or canvass of votes, or of making any returns or certificates thereof, may be had, or who molests, interferes with, removes or ejects from any such place of registration or poll of election, or of canvassing votes cast thereat, or of making returns or certificates thereof, any supervisor of election, the marshal or his general or special deputies, or either of them; or who threatens, or attempts, or offers so to do, or refuses or neglects to aid and assist any supervisor of election, or the marshal or his general or special deputies, or either of them, in the performance of his or their duties, when required by him or them, or either of them, to give such aid and assistance, shall be liable to instant arrest without process, and shall be punished by imprisonment not more than two years, or by a fine of not more than \$3,000, or by both such fine and imprisonment, and shall pay the cost of the prosecution."

These portions of the Revised Statutes are taken from the act commonly known as the Enforcement Act, approved May 31, 1870, and entitled "An act to enforce the right of citizens of the United States to vote in the several states of this Union, and for other purposes," and from the supplement of that act, approved February 28, 1871. They relate to elections of members of the house of representatives, and were an assertion, on the part of congress, of a power to pass laws for regulating and superintending said elections, and for securing the purity thereof, and the rights of citizens to vote thereat peaceably and without molestation. It must be conceded to be a most important power, and of a fundamental character. In the light of recent history, and of the violence, fraud, corruption and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, may be necessary to the stability of our frame of government.

The counsel for the petitioners, however, do not deny that congress may, if it chooses, assume the entire regulation of the elections of representatives; but they contend that it has no constitutional power to make partial regulations intended to be carried out in conjunction with regulations made by the states. The general positions contended for by the counsel of the petitioners are thus stated in their brief:

"We shall attempt to establish these propositions: 1. That the power to make regulations as to the times, places and manner of holding elections for representatives in congress, granted to congress by the constitution, is an exclusive power when exercised by congress. 2. That this power, when so exercised, being exclusive of all interference therein by the states, must be so exercised as not to interfere with or come in collision with regulations presented in that behalf by the states, unless it provides for the complete control over the whole subject over which it is exercised. 3. That when put in operation by congress it must take the place of all state regulations of the subject regulated, which subject must be entirely and completely controlled and provided for by congress."

§ 330. *The power of congress to regulate elections of senators and representatives.*

We are unable to see why it necessarily follows that, if congress makes *any* regulations on the subject, it must assume exclusive control of the *whole* subject. The constitution does not say so. The clause of the constitution under which the power of congress, as well as that of the state legislatures, to regulate the election of senators and representatives arises, is as follows: "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators." It seems to us that the natural sense of these words is the contrary of that assumed by the counsel of the petitioners. After first authorizing the states to prescribe the regulations, it is added, "The congress may *at any time*, by law, *make or alter* such regulations." "*Make or alter*:" What is the plain meaning of these words? If not under the prepossession of some abstract theory of the relations between the state and national governments, we should not have any difficulty in understanding them. There is no declaration that the regulations shall be made either wholly by the state legislatures or wholly by congress. If congress does not interfere, of course they may be made wholly by the state; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the state, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of congress over the subject is paramount. It may be exercised as and when congress sees fit to exercise it. When exercised, the action of congress, so far as it extends and conflicts with the regulations of the state, necessarily supersedes them. This is implied in the power to "*make or alter*."

§ 331. *It is not necessary to the power of congress to regulate elections that its exercise should be exclusive of state regulations.*

Suppose the constitution of a state should say, "The first legislature elected under this constitution may by law regulate the election of members of the two



houses; but any subsequent legislature may make or alter such regulations,"—could not a subsequent legislature modify the regulations made by the first legislature without making an entirely new set? Would it be obliged to go over the whole subject anew? Manifestly not: it could alter or modify, add or subtract, in its discretion. The greater power, of making wholly new regulations, would include the lesser, of only altering or modifying the old. The new law, if contrary or repugnant to the old, would so far, and so far only, take its place. If consistent with it, both would stand. The objection, so often repeated, that such an application of congressional regulations to those previously made by a state would produce a clashing of jurisdictions and a conflict of rules, loses sight of the fact that the regulations made by congress are paramount to those made by the state legislature; and if they conflict therewith, the latter, so far as the conflict extends, cease to be operative. No clashing can possibly arise. There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same legislature. Congress has partially regulated the subject heretofore. In 1842 it passed a law for the election of representatives by separate districts; and, subsequently, other laws fixing the time of election, and directing that the elections shall be by ballot. No one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject.

§ 332. *Instances of concurrent regulations by state and national authority.*

The peculiarity of the case consists in the concurrent authority of the two sovereignties, state and national, over the same subject-matter. This, however, is not entirely without a parallel. The regulation of foreign and interstate commerce is conferred by the constitution upon congress. It is not expressly taken away from the states. But where the subject-matter is one of a national character, or one that requires a uniform rule, it has been held that the power of congress is exclusive. On the contrary, where neither of these circumstances exist, it has been held that state regulations are not unconstitutional. In the absence of congressional regulation, which would be of paramount authority when adopted, they are valid and binding. This subject was largely discussed in the case of *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How., 299 (§§ 1541-47, *infra*). That was a case of pilotage. In 1789 congress had passed a law declaring that all pilots should continue to be regulated in conformity with the laws of the states, respectively, wherein they should be. Hence each state continued to administer its own laws, or passed new laws for the regulation of pilots in its harbors. Pennsylvania passed the law then in question in 1803. Yet the supreme court held that this was clearly a regulation of commerce, and that the state laws could not be upheld without supposing that, in cases like that of pilotage, not requiring a national and uniform regulation, the power of the states to make regulations of commerce, in the absence of congressional regulation, still remained. The court held that the power did so remain, subject to those qualifications; and the state law was sustained under that view.

Here, then, is a case of concurrent authority of the state and national governments, in which that of the latter is paramount. In 1837 congress interfered with the state regulations on the subject of pilotage, so far as to authorize the pilots of adjoining states, separated only by navigable waters, to pilot ships and vessels into the ports of either state located on such waters. It has since made various regulations respecting pilots taking charge of steam vessels, im-

posing upon them peculiar duties and requiring of them peculiar qualifications. It seems to us that there can be no doubt of the power of congress to impose any regulations it sees fit upon pilots, and to subject them to such penalties for breach of duty as it may deem expedient. The states continue in the exercise of the power to regulate pilotage subject to the paramount right of the national government. If dissatisfied with congressional interference, should such interference at any time be imposed, any state might, if it chose, withdraw its regulations altogether, and leave the whole subject to be regulated by congress. But so long as it continues its pilotage system, it must acquiesce in such additional regulations as congress may see fit to make.

§ 333. *Regulations of congressional elections may be made by state and national authority concurrently, the latter being paramount.*

So in the case of laws for regulating the elections of representatives to congress. The state may make regulations on the subject; congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by congress has the effect to supersede those made by the state, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system, perfectly capable of being administered and carried out as such. As to the supposed conflict that may arise between the officers appointed by the state and national governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the state. If both cannot be performed, the latter are *pro tanto* superseded and cease to be duties. If the power of congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the state. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between the different officers appointed by the state, when the state alone regulates the election. One officer cannot interfere with the duties of another, or obstruct or hinder him in the performance of them. Where there is a disposition to act harmoniously, there is no danger of disturbance between those who have different duties to perform. When the rightful authority of the general government is once conceded and acquiesced in, the apprehended difficulties will disappear. Let a spirit of national as well as local patriotism once prevail, let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the national and state governments in a matter in which they have a mutual interest.

§ 334. *Congress has power to punish those who obstruct officers appointed under its laws to secure honest elections.*

As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of the officers of election, and for their protection in the performance of those duties, the same considerations apply. While the state will retain the power of enforcing such of its own regulations as are not superseded by those adopted by congress, it cannot be disputed that if congress has power to make

regulations, it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if, as we have shown, congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the state officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, state or national. Why not? Penalties for fraud and delinquency are part of the regulations belonging to the subject. If congress, by its power to make or alter the regulations, has a general supervisory power over the whole subject, what is there to preclude it from imposing additional sanctions and penalties to prevent such fraud and delinquency?

§ 335. *The national government as well as the state government has an interest in fair elections of representatives and has the power to suppress frauds.*

It is objected that congress has no power to enforce state laws or to punish state officers, and especially has no power to punish them for violating the laws of their own state. As a general proposition this is undoubtedly true; but when in the performance of their functions state officers are called upon to fulfil duties which they owe to the United States as well as to the state, has the former no means of compelling such fulfilment? Yet that is the case here. It is the duty of the states to elect representatives to congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the state government is. It certainly is not bound to stand by as a passive spectator when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the state. This necessarily follows from the mixed character of the transaction,—state and national. A violation of duty is an offense against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a representative owes no duty to the national government which congress can enforce; or that an officer who stuffs the ballot-box cannot be made amenable to the United States. If congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because congress had not the requisite power.

§ 336. *The power of congress to enforce state laws on the subject of elections and to punish their violation.*

The objection that the laws and regulations, the violation of which is made punishable by the acts of congress, are state laws and have not been adopted by congress, is no sufficient answer to the power of congress to impose punishment. It is true that congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by state laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibi-

tion of the act punished. The state laws which congress sees no occasion to alter, but which it allows to stand, are in effect adopted by congress. It simply demands their fulfilment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

§ 337. *Liability of state officers of elections to a double responsibility and punishment, state and national, considered.*

That the duties devolved on the officers of election are duties which they owe to the United States as well as to the state, is further evinced by the fact that they have always been so regarded by the house of representatives itself. In most cases of contested elections the conduct of these officers is examined and scrutinized by that body as a matter of right; and their failure to perform their duties is often made the ground of decision. Their conduct is justly regarded as subject to the fullest exposure; and the right to examine them personally, and to inspect all their proceedings and papers, has always been maintained. This could not be done if the officers were amenable only to the supervision of the state government which appointed them. Another objection made is, that, if congress can impose penalties for violation of state laws, the officer will be made liable to double punishment for delinquency,—at the suit of the state, and at the suit of the United States. But the answer to this is, that each government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act, need not now be decided, although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained.

§ 338. *The doctrine of liability to two jurisdictions.*

In reference to a conviction under a state law for passing counterfeit coin, which was sought to be reversed on the ground that congress had jurisdiction over that subject, and might inflict punishment for the same offense, Mr. Justice Daniel, speaking for the court, said: "It is almost certain that, in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same,—unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But, were a contrary course of policy or action either probable or usual, this would by no means justify the conclusion that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." *Fox v. State of Ohio*, 5 How., 410 (§§ 496–500, *infra*). The same judge, delivering the opinion of the court in the case of *United States v. Marigold*, 9 How., 569, where a conviction was had under an act of congress for bringing counterfeit coin into the country, said, in reference to *Fox's Case*: "With the view of avoiding conflict between the state and federal jurisdictions, this court, in the case of *Fox v. State of Ohio*, have taken care to point out that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the state

and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We hold this distinction sound;" and the conviction was sustained. The subject came up again for discussion in the case of *Moore v. State of Illinois*, 14 id., 13, in which the plaintiff in error had been convicted under a state law for harboring and secreting a negro slave, which was contended to be properly an offense against the United States under the fugitive-slave law of 1793, and not an offense against the state. The objection of double punishment was again raised. Mr. Justice Grier, for the court, said: "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both." Substantially the same views are expressed in *United States v. Cruikshank*, 92 U. S., 542 (§§ 898-911, *infra*), referring to these cases; and we do not well see how the doctrine they contain can be controverted. A variety of instances may be readily suggested, in which it would be necessary or proper to apply it. Suppose, for example, a state judge having power under the naturalization laws to admit aliens to citizenship should utter false certificates of naturalization, can it be doubted that he could be indicted under the act of congress providing penalties for that offense, even though he might also, under the state laws, be indictable for forgery as well as liable to impeachment? So, if congress, as it might, should pass a law fixing the standard of weights and measures, and imposing a penalty for sealing false weights and false measures, but leaving to the states the matter of inspecting and sealing those used by the people, would not an offender, filling the office of sealer under a state law, be amenable to the United States as well as to the state?

If the officers of election, in elections for representatives, owe a duty to the United States, and are amenable to that government as well as to the state,—as we think they are,—then, according to the cases just cited, there is no reason why each should not establish sanctions for the performance of the duty owed to itself, though referring to the same act. To maintain the contrary proposition, the case of *Commonwealth of Kentucky v. Dennison*, 24 How., 66, is confidently relied on by the petitioners' counsel. But there, congress had imposed a duty upon the governor of the state which it had no authority to impose. The enforcement of the clause in the constitution requiring the delivery of fugitives from service was held to belong to the government of the United States, to be effected by its own agents; and congress had no authority to require the governor of a state to execute this duty.

§ 339. *The arguments against concurrent national and state authority and action on elections are not founded on the constitution, but at best are only based on expediency.*

We have thus gone over the principal reasons of a special character relied on by the petitioners for maintaining the general proposition for which they contend, namely, that in the regulation of elections for representatives the national and state governments cannot co-operate, but must act exclusively of each other; so that, if congress assumes to regulate the subject at all, it must assume exclusive control of the whole subject. The more general reason assigned, to wit, that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and state governments in

the election of representatives. It is at most an argument *ab inconveniente*. There is nothing in the constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause of the constitution relating to the regulation of such elections contemplates such co-operation whenever congress deems it expedient to interfere merely to alter or add to existing regulations of the state. If the two governments had an entire equality of jurisdiction, there might be an intrinsic difficulty in such co-operation. Then the adoption by the state government of a system of regulations might exclude the action of congress. By first taking jurisdiction of the subject, the state would acquire exclusive jurisdiction in virtue of a well-known principle applicable to courts having co-ordinate jurisdiction over the same matter. But no such equality exists in the present case. The power of congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the state which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the state and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the constitution itself. We cannot yield to such a transcendental view of state sovereignty. The constitution and laws of the United States are the supreme law of the land, and to these every citizen of every state owes obedience, whether in his individual or official capacity. There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the state and national sovereignties. Generally, the powers given by the constitution to the government of the United States are given over distinct branches of sovereignty from which the state governments, either expressly or by necessary implication, are excluded. But in this case expressly, and in some others by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of the state, however, being subordinate to that of the United States, whereby all questions of precedence is eliminated.

In what we have said, it must be remembered that we are dealing only with the subject of elections of representatives to congress. If, for its own convenience, a state sees fit to elect state and county officers at the same time and in conjunction with the election of representatives, congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they will be amenable to federal jurisdiction; nor do we understand that the enactments of congress now under consideration have any application to such acts. It must also be remembered that we are dealing with the question of power, not of the expediency of any regulations which congress has made. That is not within the pale of our jurisdiction. In exercising the power, however, we are bound to presume that congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with state laws and regulations, with the duties of state officers, or with local prejudices. It could not act at all so as to accomplish any beneficial object in preventing frauds and violence, and securing the faithful performance of duty

at the elections, without providing for the presence of officers and agents to carry its regulations into effect. It is also difficult to see how it could attain these objects without imposing proper sanctions and penalties against offenders. The views we have expressed seem to us to be founded on such plain and practical principles as hardly to need any labored argument in their support. We may mystify anything. But if we take a plain view of the words of the constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.

The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist between the state and national governments. It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his state government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the state governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties, than is proper to be exercised towards the state governments. Its powers are limited in number, and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the national and state governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.

§ 340. *The United States has the right to enforce its laws and keep the peace everywhere within the limits of the country.*

Several other questions bearing upon the present controversy have been raised by the counsel of the petitioners. Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the act of congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the state authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the states. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the constitution itself show which is to yield. "This constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land." This concurrent jurisdiction which the national government necessarily possesses to exercise its powers of sovereignty in all parts of the United States is distinct from that exclusive power which, by the first article of the constitution, it is authorized to exercise over the District of Columbia, and over those places within a state which are purchased by consent of the legislature thereof, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings. There its jurisdiction is absolutely exclusive of that of the state, unless, as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired. Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified.

Why do we have marshals at all if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform if they cannot use force? In executing the processes of the courts must they call on the nearest constable for protection? must they rely on him to use the requisite compulsion and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these and keep on refining and re-refining, we shall drive the national government out of the United States and relegate it to the District of Columbia or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation. The argument is based on a strained and impracticable view of the nature and powers of the national government. It must execute its powers or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction. Without specifying other instances in which this power to preserve order and keep the peace unquestionably exists, take the very case in hand. The counsel for the petitioners concede that congress may, if it sees fit, assume the entire control and regulation of the election of representatives. This would necessarily involve the appointment of the places for holding the polls, the times of voting, and the officers for holding the election; it would require the regulation of the duties to be performed, the custody of the ballots, the mode of ascertaining the result, and every other matter relating to the subject. Is it possible that congress could not, in that case, provide for keeping the peace at such elections, and for arresting and punishing those guilty of breaking it? If it could not, its power would be but a shadow and a name. But, if congress can do this, where is the difference in principle in its making provision for securing the preservation of the peace, so as to give to every citizen his free right to vote without molestation or injury, when it assumes only to supervise the regulations made by the state and not to supersede them entirely? In our judg-



ment, there is no difference; and, if the power exists in the one case, it exists in the other.

§ 341. *Where national law conflicts with the state law it is the latter that is void.*

The next point raised is, that the act of congress proposes to operate on officers or persons authorized by state laws to perform certain duties under them, and to require them to disobey and disregard state laws when they come in conflict with the act of congress; that it thereby of necessity produces collision, and is, therefore, void. This point has been already fully considered. We have shown, as we think, that where the regulations of congress conflict with those of the state it is the latter which are void and not the regulations of congress; and that the laws of the state, in so far as they are inconsistent with the laws of congress on the same subject, cease to have effect as laws.

§ 342. *It is not unconstitutional to require United States courts to appoint officers not judicial.*

Finally, it is objected that the act of congress imposes upon the circuit courts duties not judicial, in requiring them to appoint the supervisors of election, whose duties, it is alleged, are entirely executive in their character. It is contended that no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government. The constitution declares that "the congress may, by law, vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law or in the heads of departments." It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of marshal, for instance. He is an executive officer whose appointment, in ordinary cases, is left to the president and senate. But if congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the president alone, in the department of justice or in the courts. The marshal is pre-eminently the officer of the courts; and, in case of a vacancy, congress has in fact passed a law bestowing the temporary appointment of the marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.

But as the constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of congress. And, looking at the subject in a practical light, it is perhaps better that it should rest there than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise. The observation in the case of Hennen, to which reference is made (13 Pet., 258), that the appointing power in the clause referred to "was, no doubt, intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged," was not intended to define the constitutional power of congress in this regard, but rather to express the law or rule by which it should be governed: The cases in which the courts have declined to exercise certain duties imposed by congress stand upon a different consideration from that which applies in the present case. The law of 1792, which required the circuit courts to examine claims to revolutionary pensions, and the law of 1849, authorizing the district judge of

Florida to examine and adjudicate upon claims for injuries suffered by the inhabitants of Florida from the American army in 1812, were rightfully held to impose upon the courts powers not judicial, and were, therefore, void. But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depository of official power capable of exercising it. Neither the president nor any head of department could have been equally competent to the task. In our judgment, congress had the power to vest the appointment of the supervisors in question in the circuit courts.

§ 343. *How far state and federal governments are co-ordinate and equal.*

The doctrine laid down at the close of counsel's brief, that the state and national governments are co-ordinate and altogether equal, on which their whole argument, indeed, is based, is only partially true. The true doctrine, as we conceive, is this: that whilst the states are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the constitution and constitutional laws of the latter are, as we have already said, the supreme law of the land; and, when they conflict with the laws of the states, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the constitution is based; and, unless it be conceded in practice as well as theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved have respect not more to the autonomy and existence of the states than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land.

We think that the cause of commitment in these cases was lawful, and that the application for a writ of *habeas corpus* must be denied.

*Application denied. (a)*

JUSTICES CLIFFORD and FIELD dissented.

#### EX PARTE CLARKE.

(10 Otto, 399-422. 1879.)

This case follows the preceding case. "The petition for a *habeas corpus* was addressed to the judges of the supreme court of the United States by Augustus F. Clarke, who states therein that he is a member of the city council of Cincinnati, and, as such, one of the judges of election of precinct A in said city; in which capacity he acted at the state, congressional, county and municipal elections held in said city in October, 1878. That on the 24th of October, 1878, he was indicted in the circuit court of the United States for the southern district of Ohio for unlawfully neglecting to perform the duty required of him as such judge of election by the laws of the state of Ohio in regard to said election, in this, that having accepted one of the poll-books of said election, sealed and directed according to law, for the purpose of conveying the same to

(a) In *United States v. Quinn*,\* 8 Blatch., 48, in an oral opinion delivered by Woodruff, J., it is held that congress may provide for the punishment of voters at elections for representatives in congress who violate the state laws relating to the registration of voters; that it is not an attempt to prescribe the qualifications of voters to require them to conform to the state registration laws.

the clerk of the court of common pleas of Hamilton county, in said state, at his office, he neglected to do so; and in another count, that he permitted the said poll-books, sealed and directed for the purpose aforesaid, to be broken open before he conveyed the same to said clerk."

In the decision of the case on the merits the court uses the following language: "As to the merits of the case, there can be no serious question that the indictment charges an offense specified in the act of congress. R. S., sec. 5515. Any defect of form in making the charge would be at most an error of which this court could not take cognizance on *habeas corpus*. The principal question is whether congress had constitutional power to enact a law for punishing a state officer of election for the violation of his duty under a state statute in reference to an election of a representative to congress. As this question has been fully considered in the previous case, (a) it is unnecessary to add anything further on the subject. Our opinion is, that congress had constitutional power to enact the law; and that the cause of commitment was lawful and sufficient."

Dissenting opinion by MR. JUSTICE FIELD, MR. JUSTICE CLIFFORD concurring.

I cannot assent to the decision of the majority of the court in this and the preceding case, and I will state the reasons of my dissent. One of the six petitioners is a citizen of Ohio, and the other five are citizens of Maryland. They all seek a discharge from imprisonment imposed by judgments of federal courts for alleged official misconduct as judges of election in their respective states. At an election held in the first congressional district of Ohio, in October, 1878, at which a representative in congress was voted for, the petitioner from that state was appointed under its laws, and acted as a judge of election at a precinct in one of the wards of the city of Cincinnati. At an election held in the fourth and fifth congressional districts of Maryland, in November, 1878, at which a representative in congress was voted for, the petitioners from that state were appointed under its laws, and acted as judges of election at different precincts in the wards of the city of Baltimore. For alleged misconduct as such officers of election the petitioners were indicted in the circuit courts of the United States for their respective districts, tried, convicted and sentenced to imprisonment for twelve months, and, in some of the cases, also to pay a fine.

In what I have to say I shall confine myself principally to the case of the petitioner from Ohio; the other cases will be incidentally considered. In that case, the petitioner is charged with having violated a law of the state. In the cases from Maryland, the petitioners are charged with having prevented federal officers from interfering with them and supervising their action in the execution of the laws of the state. The principle which governs one will dispose of all of them; for if congress cannot punish an officer of a state for the manner in which he discharges his duties under her laws, it cannot subject him to the supervision and control of others in the performance of such duties, and punish him for resisting their interference. In the cases from Maryland, it appears that the laws of the state under which the petitioners were appointed judges of election, and the registration of voters for the election of 1878 was made, were not in existence when the act of congress was passed providing for the appointment of supervisors to examine the registration and scrutinize the lists, and of special deputy marshals to aid and protect them. The act of congress was passed in 1871, and republished in the Revised Statutes, which are

(a) *Ex parte Siebold*, §§ 326-313, *supra*.

declaratory of the law in force, December 1, 1873. The law of Maryland, under which the registration of voters was had, was enacted in 1874, and the law under which the judges of election were appointed was enacted in 1876, and these judges were required to possess different qualifications from those required of judges of election in 1871 and 1873. In all the cases the petitioners are imprisoned under the judgments against them; and each one insisting that the circuit court, in his case, acted without jurisdiction, and that his imprisonment is, therefore, unlawful and subversive of his rights as a citizen, has petitioned this court for a writ of *habeas corpus*, annexing to his petition a transcript of the record of the proceedings against him; and prays that he may be released from restraint.

It has been settled by this court that the writ of *habeas corpus* is one of the modes by which its appellate jurisdiction will be exercised in cases where it is alleged that by the action of an inferior tribunal a citizen of the United States has been unlawfully deprived of his personal liberty; and, if, necessary, that a *certiorari* will be issued with the writ to bring up for examination the record of the proceedings of the inferior tribunal. In such cases, we look into that record to see, not whether the court erred in its rulings, but whether it had jurisdiction to impose the imprisonment complained of. If it had jurisdiction our examination ends, and the case must await determination in the ordinary course of procedure on writ of error or appeal, should the case be one which can thus be brought under our review. But if the court below was without jurisdiction of the matter upon which the judgment of imprisonment was rendered, or if it exceeded its jurisdiction in the extent of the imprisonment imposed, this court will interfere and discharge the petitioner. If, therefore, the act of congress, in seeking to impose a punishment upon a state officer in one of these cases for disobeying a law of the state, and in the other cases for resisting the interference of federal officials with the discharge of his duties under such law, is unconstitutional and void, the judgments of the circuit courts are unlawful, and the petitioners should be released.

I do not regard the presentation by the petitioner from Ohio of his petition to one of the justices of the court, in the first instance, as a fact at all affecting his case. His petition is addressed to this court, and though the justice who allowed the writ directed that it should be returnable before himself, he afterwards ordered the hearing upon it to be had before this court. The petition may, therefore, with propriety, be treated as if presented to us in the first instance. Irregularities in that regard should not be allowed to defeat its purpose, the writ being designed for the security of the personal liberty of the citizen. The act of congress upon which the indictment of the petitioner from Ohio was founded is contained in section 5515 of the Revised Statutes, which declares that "every officer of an election at which any representative or delegate in congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any state, territorial, district or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized with intent to affect any such election or the result thereof, . . . shall be punished as prescribed" in a previous section; that is, by a fine not exceeding \$1,000, or imprisonment not more than one year, or by both.

The indictment contains three counts, the third of which was abandoned.

The first count charges unlawful neglect on the part of the accused to perform a duty required of him by the laws of the state, in not carrying to the clerk of the court of common pleas one of the poll-books of the election, covered and sealed by the judges of election, with which he was intrusted by them for that purpose. The second count charges the violation of a duty required of him by the laws of the state in permitting one of the poll-books, covered and sealed, intrusted to him by the judges of election to carry to the clerk of the court of common pleas, to be broken open before he conveyed it to that officer. The law of Ohio, to which reference is had in the indictment, provides that after the votes at an election are canvassed "the judges, before they disperse, shall put under cover one of the poll-books, seal the same, and direct it to the clerk of the court of common pleas of the county wherein the return is to be made; and the poll-book thus sealed and directed shall be conveyed by one of the judges (to be determined by lot if they cannot agree otherwise) to the clerk of the court of common pleas of the county, at his office, within two days from the day of the election."

The provisions of the act of congress relating to the appointment of supervisors of election, the powers with which they are intrusted, and the aid to be rendered them by marshals and special deputy marshals, for resisting and interfering with whom the petitioners from Maryland have been condemned and are imprisoned, are stated in the opinion of the court. It is sufficient to observe that they authorize the supervisors to supervise the action of the state officers from the registration of voters down to the close of the polls on the day of election; require the marshals to aid and protect them, and provide for the appointment of special deputy marshals in towns and cities of over twenty thousand inhabitants; and they invest those federal officers with a power to arrest and take into custody persons without process, more extended than has ever before in our country, in time of peace, been intrusted to any one.

In what I have to say I shall endeavor to show, 1st, that it is not competent for congress to punish a state officer for the manner in which he discharges duties imposed upon him by the laws of the state, or to subject him in the performance of such duties to the supervision and control of others, and punish him for resisting their interference; and 2d, that it is not competent for congress to make the exercise of its punitive power dependent upon the legislation of the states.

§ 344. *When a state law is adopted by congress, it must be enforced as a law of the United States.*

There is no doubt that congress may adopt a law of a state, but in that case the adopted law must be enforced as a law of the United States. Here there is no pretense of such adoption. In the case from Ohio it is for the violation of a state law, not a law of the United States, that the indictment was found. The judicial power of the United States does not extend to a case of that kind. The constitution defines and limits that power. It declares that it shall extend to cases in law and equity arising under the constitution, the laws of the United States, and treaties made under their authority; to cases affecting ambassadors, other public ministers and consuls; to cases of admiralty and maritime jurisdiction, and to various controversies to which the United States or a state is a party, or between citizens of different states, or citizens of the same state claiming lands under grants of different states, or between citizens of a state and any foreign state, citizens or subjects. The term "controversies" as here used refers to such only as are of a civil as distinguished from those of a criminal

nature. The judicial power thus defined may be applied to new cases as they arise under the constitution and laws of the United States, but it cannot be enlarged by congress so as to embrace cases not enumerated in the constitution. It has been so held by this court from the earliest period. It was so adjudged in 1803 in *Marbury v. Madison*, and the adjudication has been affirmed in numerous instances since. This limitation upon congress would seem to be conclusive of the case from Ohio. To authorize a criminal prosecution in the federal courts for an offense against a law of a state is to extend the judicial power of the United States to a case not arising under the constitution or laws of the United States.

§ 345. *Congress cannot punish state officers for violation of state laws.*

But there is another view of this subject which is equally conclusive against the jurisdiction of the federal court. The act of congress asserts a power inconsistent with, and destructive of, the independence of the states. The right to control their own officers, to prescribe the duties they shall perform, without the supervision or interference of any other authority, and the penalties to which they shall be subjected for a violation of duty, is essential to that independence. If the federal government can punish a violation of the laws of the state, it may punish obedience to them, and graduate the punishment according to its own judgment of their propriety and wisdom. It may thus exercise a control over the legislation of the states subversive of all their reserved rights. However large the powers conferred upon the government formed by the constitution, and however numerous its restraints, the right to enforce their own laws by such sanctions as they may deem appropriate is left, where it was originally, with the states. It is a right which has never been surrendered. Indeed a state could not be considered as independent in any matter, with respect to which its officers, in the discharge of their duties, could be subjected to punishment by any external authority; nor in which its officers, in the execution of its laws, could be subject to the supervision and interference of others.

The invalidity of coercive measures by the United States, to compel an officer of a state to perform a duty imposed upon him by a law of congress, is asserted in explicit terms in the case of *Commonwealth of Kentucky v. Dennison*, 24 How., 66. The constitution declares that "a person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." And the act of congress of 1793, to give effect to this clause, made it the duty of the executive authority of the state, upon the demand mentioned, and the production of a properly authenticated copy of the indictment or affidavit charging the person demanded with the commission of treason, felony or other crime, to surrender the fugitive. The governor of Ohio having refused upon a proper demand to surrender a fugitive from justice from Kentucky, the governor of the latter state applied to this court for a *mandamus* to compel the performance of that duty. But the court, after observing that though the words, "it shall be the duty," in ordinary legislation implied the assertion of the power to command and to cause obedience, said that, looking to the subject-matter of the law and "the relations which the United States and the several states bear to each other," it was of opinion that the words were not used as mandatory and compulsory, but as declaratory of the moral duty created, when congress had provided the mode of carrying the provision into execution. "The act does not provide," the court added, "any means to

compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution which arms the government of the United States with this power. Indeed, such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the federal government, under the constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state. It is true that congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal. And we are very far from supposing that in using this word 'duty,' the statesmen who framed and passed the law, or the president who approved and signed it, intended to exercise a coercive power over state officers not warranted by the constitution." And again: "If the governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him."

If it be incompetent for the federal government to enforce by coercive measures the performance of a plain duty, imposed by a law of congress upon the executive officer of a state, it would seem to be equally incompetent for it to enforce by similar measures the performance of a duty imposed upon him by a law of a state. If congress cannot impose upon a state officer, as such, the performance of any duty, it would seem logically to follow that it cannot subject him to punishment for the neglect of such duties as the state may impose. It cannot punish for the non-performance of a duty which it cannot prescribe. It is a contradiction in terms to say that it can inflict punishment for disobedience to an act the performance of which it has no constitutional power to command. I am not aware that the doctrine of this case, which is so essential to the harmonious working of the state and federal governments, has ever been qualified or departed from by this court, until the recent decisions in the Virginia cases, of which I shall presently speak. It is true that, at an early period in the history of the government, laws were passed by congress, authorizing state courts to entertain jurisdiction of proceedings by the United States to enforce penalties and forfeitures under the revenue laws, and to hear allegations, and take proofs, if application were made for their remission. To these laws reference is made in the Kentucky case; and the court observes that the powers which they conferred were for some years exercised by the state tribunals, without objection, until, in some of the states, their exercise was declined, because it interfered with and retarded the performance of duties which properly belonged to them as state courts, and in other states because doubts arose as to the power of state courts to inflict penalties and forfeitures for offenses against the general government, unless specially authorized to do so by the states; and that the co-operation of the states in those cases was a matter of comity which the several sovereignties extended to one another for their mutual benefit, and was not regarded by either party as an obligation imposed by the constitution.

It is to be observed that, by the constitution, the demand for the surrender

of a fugitive is to be made by the executive authority of the state from which he has fled; but it is not declared upon whom the demand shall be made. That was left to be determined by congress; and it provided that the demand should be made upon the executive of the state where the fugitive was found. It might have employed its own agents, as in the enforcement of the fugitive-slave law, and compelled them to act. But in both cases, if it employed the officers of the state, it could not restrain nor coerce them.

Whenever, therefore, the federal government, instead of acting through its own officers, seeks to accomplish its purposes through the agency of officers of the states, it must accept the agency with the conditions upon which the officers are permitted to act. For example, the constitution invests congress with the "power to establish a uniform rule of naturalization;" and this power, from its nature, is exclusive. A concurrent power in the states would prevent the uniformity of regulations required on the subject. *Chirac v. Chirac*, 2 Wheat., 259; *The Federalist*, No. 42. Yet congress, in legislating under this power, has authorized courts of record of the states to receive declarations under oath by aliens of their intention to become citizens, and to admit them to citizenship after a limited period of residence, upon satisfactory proof as to character and attachment to the constitution. But, when congress prescribed the conditions and proof upon which aliens might, by the action of the state courts, become citizens, its power ended. It could not coerce the state courts to hold sessions for such applications, nor fix the time when they should hear the applicants, nor the manner in which they should administer the required oaths, nor regulate in any way their procedure. It could not compel them to act by *mandamus* from its own tribunals, nor subject their judges to criminal prosecution for their non-action. It could accept the agency of those courts only upon such terms as the states should prescribe. The same thing is true in all cases where the agency of state officers is used; and this doctrine applies with special force to judges of elections, at which numerous state officers are chosen at the same time with representatives to congress. So far as the election of state officers and the registration of voters for their election are concerned, the federal government has confessedly no authority to interfere. And yet the supervision of and interference with the state regulations, sanctioned by the act of congress, when representatives to congress are voted for, amount practically to a supervision of and an interference with the election of state officers, and constitute a plain encroachment upon the rights of the states, which is well calculated to create irritation towards the federal government, and disturb the harmony that all good and patriotic men should desire to exist between it and the state governments.

It was the purpose of the framers of the constitution to create a government which could enforce its own laws, through its own officers and tribunals, without reliance upon those of the states, and thus avoid the principal defect of the government of the confederation, and they fully accomplished their purpose; for, as said by Chief Justice Marshall, in the *McCullough Case*, "No trace is to be found in the constitution of an intention to create a dependence of the federal government on the governments of the states for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends." When, therefore, the federal government desires to compel by coercive measures and punitive sanctions the performance of any duties devolved upon it by the constitution, it must appoint its own officers and agents, upon whom its



power can be exerted. If it sees fit to intrust the performance of such duties to officers of a state, it must take their agency, as already stated, upon the conditions which the state may impose. The co-operative scheme to which the majority of the court give their sanction, by which the general government may create one condition and the states another, and each make up for and supplement the omissions or defects in the legislation of the other, touching the same subject, with its separate penalties for the same offense, and thus produce a harmonious mosaic of statutory regulation, does not appear to have struck the great jurist as a feature in our system of government or one that had been sanctioned by its founders.

It is true that, since the recent amendments of the constitution, there has been legislation by congress asserting, as in the instance before us, a direct control over state officers, which previously was never supposed to be compatible with the independent existence of the states in their reserved powers. Much of that legislation has yet to be brought to the test of judicial examination; and, until the recent decisions in the Virginia cases, I could not have believed that the former carefully considered and repeated judgments of this court upon provisions of the constitution, and upon the general character and purposes of that instrument, would have been disregarded and overruled. These decisions do, indeed, in my judgment, constitute a new departure. They give to the federal government the power to strip the states of the right to vindicate their authority in their own courts against a violator of their laws, when the transgressor happens to be an officer of the United States, or alleges that he is denied or cannot enforce some right under their laws. And they assert for the federal government a power to subject a judicial officer of a state to punishment for the manner in which he discharges his duties under her laws. The power to punish at all existing, the nature and extent of the punishment must depend upon the will of congress, and may be carried to a removal from office. In my judgment,—and I say it without intending any disrespect to my associates,—no such advance has ever before been made toward the conversion of our federal system into a consolidated and centralized government. I cannot think that those who framed and advocated, and the states which adopted, the amendments, contemplated any such fundamental change in our theory of government as those decisions indicate. Prohibitions against legislation on particular subjects previously existed,—as, for instance, against passing a bill of attainder and an *ex post facto* law, or a law impairing the obligation of contracts; and, in enforcing those prohibitions, it was never supposed that criminal prosecutions could be authorized against members of the state legislature for passing the prohibited laws, or against members of the state judiciary for sustaining them, or against executive officers for enforcing the judicial determinations. Enactments prescribing such prosecutions would have given a fatal blow to the independence and autonomy of the states. So, of all or nearly all the prohibitions of the recent amendments, the same doctrine may be asserted. In few instances could legislation by congress be deemed appropriate for their enforcement, which should provide for the annulment of prohibited laws in any other way than through the instrumentality of an appeal to the judiciary, when they impinged upon the rights of parties. If, in any instance, there could be such legislation authorizing a criminal prosecution for disregarding a prohibition, that legislation should define the offense and declare the punishment, and not invade the independent action of the different departments of the state governments within their appropriate spheres.

Legislation by congress can neither be necessary nor appropriate which would subject to criminal prosecution state officers for the performance of duties prescribed by state laws, not having for their object the forcible subversion of the government.

§ 346. *Congress has power to alter and make new regulations for the conduct of congressional elections, not to enforce those already adopted by the state.*

The clause of the constitution upon which reliance was placed by counsel, on the argument, for the legislation in question, does not, as it seems to me, give the slightest support to it. That clause declares that "the times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators." The power of congress thus conferred is either to alter the regulations prescribed by the state or to make new ones; the alteration or new creation embracing every particular of time, place and manner, except the place of choosing senators. But in neither mode, nor in any respect, has congress interfered with the regulations prescribed by the legislature of Ohio, or with those prescribed by the legislature of Maryland. It has not altered them, nor made new ones. It has simply provided for the appointment of officers to supervise the execution of the state laws, and of marshals to aid and protect them in such supervision, and has added a new penalty for disobeying those laws. This is not enforcing an altered or a new regulation. Whatever congress may properly do touching the regulations, one of two things must follow: either the altered or the new regulation remains a state law, or it becomes a law of congress. If it remain a state law, it must, like other laws of the state, be enforced through its instrumentalities and agencies, and with the penalties which it may see fit to prescribe, and without the supervision or interference of federal officials. If, on the other hand, it become a law of congress, it must be carried into execution by such officers and with such sanctions as congress may designate. But as congress has not altered the regulations for the election of representatives prescribed by the legislature of Ohio or of Maryland, either as to time, place or manner, nor adopted any regulations of its own, there is nothing for the federal government to enforce on the subject. The general authority of congress to pass all laws necessary to carry into execution its granted powers supposes some attempt to exercise those powers. There must, therefore, be some regulations made by congress, either by altering those prescribed by the state, or by adopting entirely new ones, as to the times, places and manner of holding elections for representatives, before any incidental powers can be invoked to compel obedience to them. In other words, the implied power cannot be invoked until some exercise of the express power is attempted, and then only to aid its execution. There is no express power in congress to enforce state laws by imposing penalties for disobedience to them; its punitive power is only implied as a necessary or proper means of enforcing its own laws; nor is there any power delegated to it to supervise the execution by state officers of state laws.

§ 347. *Congress has no power to appoint supervisors of congressional elections.*

If this view be correct, there is no power in congress, independently of all other considerations, to authorize the appointment of supervisors and other officers to superintend and interfere with the election of representatives under the laws of Ohio and Maryland, or to annex a penalty to the violation of those laws, and the action of the circuit courts was without jurisdiction and void.

The act of congress in question was passed, as it seems to me, in disregard of the object of the constitutional provision. That was designed simply to give to the general government the means of its own preservation against a possible dissolution from the hostility of the states to the election of representatives, or from their neglect to provide suitable means for holding such elections. This is evident from the language of its advocates, some of them members of the convention, when the constitution was presented to the country for adoption. In commenting upon it in his report of the debates, Mr. Madison said that it was meant "to give the national legislature a power not only to alter the provisions of the states, but to make regulations, *in case the states should fail or refuse altogether.*" Elliott's Debates, 402. And in the Virginia convention called to consider the constitution, he observed that "it was found impossible to fix the time, place and manner of the election of representatives in the constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to *produce uniformity and prevent its own dissolution.*" 3 id., 367. And in the Federalist, Hamilton said, that the propriety of the clause in question rested "upon the evidence of the plain proposition that every government should contain in itself the means of its own preservation." Similar language is found in the debates in conventions of the other states and in the writings of jurists and statesmen of the period. The conduct of Rhode Island was referred to as illustrative of the evils to be avoided. That state was not represented by delegates in congress for years, owing to the character and views of the prevailing party; and congress was often embarrassed by their absence. The same evil, it was urged, might result from a similar cause, and congress should, therefore, possess the power to give the people an opportunity of electing representatives if the states should neglect or refuse to make the necessary regulations.

In the conventions of several states which ratified the constitution an amendment was proposed to limit in express terms the action of congress to cases of neglect or refusal of a state to make proper provisions for congressional elections, and was supported by a majority of the thirteen states; but it was finally abandoned upon the ground of the great improbability of congressional interference so long as the states performed their duty. When congress does interfere and provide regulations, the duty of rendering them effectual, so far as they may require affirmative action, will devolve solely upon the federal government. It will then be federal power which is to be exercised, and its enforcement, if promoted by punitive sanctions, must be through federal officers and agents; for, as said by Mr. Justice Story in *Prigg v. Pennsylvania*, "The national government, in the absence of all positive provisions to the contrary, is bound, through its own proper department, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution." If state officers and state agents are employed, they must be taken, as already said, with the conditions upon which the states may permit them to act, and without responsibility to the federal authorities. The power vested in congress is to alter the regulations prescribed by the legislatures of the states, or to make new ones, as to the times, places and manner of *holding* the elections. Those which relate to the times and places will seldom require any affirmative action beyond their designation. And regulations as to the *manner of holding* them cannot extend beyond the designation of the mode in which the will of the voters shall be expressed and

ascertained. The power does not authorize congress to determine who shall participate in the election, or what shall be the qualification of voters. These are matters not pertaining to or involved in the *manner of holding* the election, and their regulation rests exclusively with the states. The only restriction upon them with respect to these matters is found in the provision that the electors of representatives in congress shall have the qualifications required for electors of the most numerous branch of the state legislature, and the provision relating to the suffrage of the colored race. And whatever regulations congress may prescribe as to the manner of holding the election for representatives must be so framed as to leave the election of state officers free, otherwise they cannot be maintained. In one of the numbers of the *Federalist*, Mr. Hamilton, in defending the adoption of the clause in the constitution, uses this language: "Suppose an article had been introduced into the constitution empowering the United States to regulate the elections for the particular states, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the state governments? The violation of principle in this case would have required no comment." By the act of congress sustained by the court, an interference with state elections is authorized almost as destructive of their control by the states as the direct regulation which he thought no man would hesitate to condemn.

The views expressed derive further support from the fact that the constitutional provision applies equally to the election of senators, except as to the place of choosing them, as it does to the election of representatives. It will not be pretended that congress could authorize the appointment of supervisors to examine the roll of members of state legislatures and pass upon the validity of their titles, or to scrutinize the balloting for senators; or could delegate to special deputy marshals the power to arrest any member resisting and repelling the interference of the supervisors. But if congress can authorize such officers to interfere with the judges of election appointed under state laws in the discharge of their duties when representatives are voted for, it can authorize such officers to interfere with members of the state legislatures when senators are voted for. The language of the constitution conferring power upon congress to alter the regulations of the states, or to make new regulations on the subject, is as applicable in the one case as in the other. The objection to such legislation in both cases is that state officers are not responsible to the federal government for the manner in which they perform their duties, nor subject to its control. Penal sanctions and coercive measures by federal law cannot be enforced against them. Whenever, as in some instances is the case, a state officer is required by the constitution to perform a duty, the manner of which may be prescribed by congress, as in the election of senators by members of state legislatures, those officers are responsible only to their states for their official conduct. The federal government cannot touch them. There are remedies for their disregard of its regulations, which can be applied without interfering with their official character as state officers. Thus, if its regulations for the election of senators should not be followed, the election had in disregard of them might be invalidated; but no one, however extreme in his views, would contend that in such a case the members of the legislature could be subjected to criminal prosecution for their action. With respect to the election of representatives, so long as congress does not adopt regulations of its own and enforce them through federal officers, but permits the regulations of the states to remain, it must depend for a compliance with them upon the fidelity

of the state officers and their responsibility to their own government. All the provisions of the law, therefore, authorizing supervisors and marshals to interfere with those officers in the discharge of their duties, and providing for criminal prosecutions against them in the federal courts, are, in my judgment, clearly in conflict with the constitution. The law was adopted, no doubt, with the object of preventing frauds at elections for members of congress, but it does not seem to have occurred to its authors that the states are as much interested as the general government in guarding against frauds at those elections and in maintaining their purity, and, if possible, more so, as their principal officers are elected at the same time. If fraud be successfully perpetrated in any case, they will be the first and the greatest sufferers. They are invested with the sole power to regulate domestic affairs of the highest moment to the propriety and happiness of their people, affecting the acquisition, enjoyment, transfer and descent of property; the marriage relation and the education of children; and if such momentous and vital concerns may be wisely and safely intrusted to them, I do not think that any apprehension need be felt if the supervision of all elections in their respective states should also be left to them.

Much has been said in argument of the power of the general government to enforce its own laws, and in so doing to preserve the peace, though it is not very apparent what pertinency the observations have to the questions involved in the cases before us. No one will deny that in the powers granted to it the general government is supreme, and that, upon all subjects within their scope, it can make its authority respected and obeyed throughout the limits of the republic; and that it can repress all disorders and disturbance which interfere with the enforcement of its laws. But I am unable to perceive in this fact, which all sensible men acknowledge, any cause for the exercise of ungranted power. The greater its lawful power, the greater the reason for not usurping more. Unrest, disquiet and disturbance will always arise among a people jealous of their rights, from the exercise by the general government of powers which they have reserved to themselves or to the states.

§ 348. *Congress cannot make the exercise of its punitive power dependent upon the legislation of the states.*

My second proposition is that it is not competent for congress to make the exercise of its punitive power dependent upon the legislation of the states. The act upon which the indictment of the petitioner from Ohio is founded makes the neglect or violation of a duty prescribed by a law of the state in regard to an election at which a representative in congress is voted for, a criminal offense. It does not say that the neglect or disregard of a duty prescribed by any *existing* law shall constitute such an offense. It is the neglect or disregard of *any duty* prescribed by *any law* of the state, *present or future*. The act of congress is not changed in terms with the changing laws of the state; but its penalty is to be shifted with the shifting humors of the state legislatures. I cannot think that such punitive legislation is valid, which varies, not by direction of the federal legislators, upon new knowledge or larger experience, but by the direction of some external authority which makes the same act lawful in one state and criminal in another, not according to the views of congress as to its propriety, but to those of another body. The constitution vests all the legislative power of the federal government in congress; and from its nature this power cannot be delegated to others, except as its delegation may be involved by the creation of an inferior local government or department. Con-

gress can endow territorial governments and municipal corporations with legislative powers, as the possession of such powers for certain purposes of local administration is indispensable to their existence. So, also, it can invest the heads of departments and of the army and navy with power to prescribe regulations to enforce discipline, order and efficiency. Its possession is implied in their creation; but legislative power over subjects which come under the immediate control of congress, such as defining offenses against the United States, and prescribing punishment for them, cannot be delegated to any other government or authority. Congress cannot, for example, leave to the states the enactment of laws and restrict the United States to their enforcement. There are many citizens of the United States in foreign countries, in Japan, China, India and Africa. Could congress enact that a crime against one of those states should be punished as a crime against the United States? Can congress abdicate its functions and depute foreign countries to act for it? If congress cannot do this with respect to offenses against those states, how can it enforce penalties for offenses against any other states, though they be of our own Union? If congress could depute its authority in this way; if it could say that it will punish as an offense what another power enacts as such, it might do the same thing with respect to the commands of any other authority, as, for example, of the president or the head of a department. It could enact that what the president proclaims shall be law; that what he declares to be offenses shall be punished as such. Surely no one will go so far as this, and yet I am unable to see the distinction in principle between the existing law and the one I suppose, which seems so extravagant and absurd.

I will not pursue the subject further, but those who deem this question at all doubtful or difficult may find something worthy of thought in the opinions of the court of appeals of New York and of the supreme courts of several other states, where this subject is treated with a fullness and learning which leaves nothing to be improved and nothing to be added. I am of opinion that the act of congress was unauthorized and invalid; that the indictment of the petitioner from Ohio, and also the indictments of the petitioners from Maryland, and their imprisonment, are illegal, and that, therefore, they should all be set at liberty.

IN RE ENGLE ET AL.

(Circuit Court for Maryland: 1 Hughes, 592-593. 1877.)

Opinion by BOND, J.

STATEMENT OF FACTS.—The facts in these cases important to their decision are within a very narrow compass. The statements made by the petitioners differ little from the statements made by the respondents respecting them. The petitioners were appointed special deputy marshals at the late election for representatives in congress, under section 2021, title 26, Revised Statutes of the United States. While in the performance of their duties as such deputies at the fourth precinct of the twentieth ward, in the city of Baltimore, they arrested two persons and took one of them before a United States commissioner, where he was immediately discharged on bail and returned to the poll. The other person arrested was taken to the chief marshal of the ward, where he was by him released. There was no unnecessary violence or, indeed, any rough usage whatever used in making these arrests. If guilty at all, the special deputy marshals are guilty of a mere technical assault and battery. The one party arrested was charged with conduct at the poll tending to a

breach of the peace, being intoxicated and noisy. The other was arrested for holding tickets having the heads of President Grant or the late President Lincoln thereon, which he was offering to approaching voters — these tickets having the name of the nominee of the democratic party for congress printed on them, while the cuts indicated that they were republican tickets. This was conceived to be an attempt to deceive the colored men there offering to poll, of which class of voters there was a large number in that ward who could not read. The special deputy marshals were charged with assault and battery by the parties whom they had arrested, before the proper state officers. Warrants were issued for them, and, having been taken into custody, they filed petitions for writs of *habeas corpus*. These writs were issued, and the special deputy marshals were discharged on bail by the judge of the circuit court of the United States. The grand jury of the criminal court of Baltimore city subsequently indicted them for assault and battery and for intimidating voters, and being again arrested they were again released on *habeas corpus* on bail. The acts for which the petitioners were first arrested and subsequently indicted, it was proved at the hearing and admitted in the argument, were simply the arrests made by them at the polls of the congressional election, while acting as deputy marshals as above stated.

§ 349. *The act of congress of February 28, 1871 (Revised Statutes, sections 2021, 2022), is constitutional, being authorized by section 4, article I, of the constitution of the United States.*

This is a motion to quash the writs of *habeas corpus* so issued. Under this state of facts two questions arise which have been elaborately and well argued by the state's attorney of Baltimore city on the part of the respondents, and by the district attorney on the part of the petitioners. The first is: Are the acts of the 28th of February, 1871, and the amendments now contained in sections embraced under title 26 of the Revised Statutes, constitutional; and, more particularly, was it within the power of congress to enact section 2021 of the Revised Statutes, which provides for the appointment of special deputy marshals to attend the election of representatives and delegates in congress; and section 2022, which defines the duties of such deputies, requiring them, among other things, to keep the peace and preserve order at the polls? And the second question is: Supposing these sections to be constitutional, were the deputy marshals justified in arresting these parties for the causes above noted? Section 4 of the first article of the constitution of the United States provides that "the time, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators." Under this section of the constitution, the legislatures of the states for a long time proceeded by law to determine the time, places and manner of choosing the representatives in congress, but by the act of the 3d of February, 1872, congress, in the exercise of its authority under this fourth section, provided by law the time of holding the election of representatives throughout the United States. The state legislatures had likewise provided the time and manner for the election of senators until congress, in the exercise of the same power, by the act of July 25, 1866, determined by law the time and manner of the election of senators of the United States.

§ 350. *What necessary to the holding of an election.*

It will not, we suppose, be disputed that the clause of the constitution which in the same words grants power to two distinct bodies must grant the same

power to each, and that if, under section 4 of article I of the constitution of the United States above quoted, state legislatures have from the foundation of the government, and without objection, provided the judges and inspectors of elections for federal officers, and have determined that the vote shall be *viva voce* or by ballot, as they thought best, that the congress of the United States, under the same clause, may do the same thing. The constitution provides that there shall be a house of representatives, and further, that congress may regulate the manner of the election of the members of it. An election, within the meaning of the constitution, is the result of the free expression of the choice of the electors at the time and place appointed by law, and the declaration of the result by those appointed for the purpose. The manner of an election is nothing more nor less than the mode of effecting this purpose. This includes the power to appoint the persons to hold it; for if the election is determined by law to be by ballot, they must be duly authorized to receive the vote. If it be *viva voce*, there must be some one to record the names of those whom the electors announce as their choice. There must be some one to count the votes, else the choice of the electors could never be ascertained. The states prescribe the qualifications of the electors. To receive the votes of such qualified voters only, and to provide that all such qualified persons who offer to vote do so, is to hold an election. The mode of effecting this result is the manner of the election, which the states have all along regulated, and do in many particulars now regulate, but which regulation, to some extent, congress has itself undertaken to make and alter. But it is argued that even admitting the power of congress to appoint, as the states have heretofore done, the officers to conduct a congressional election, there is no power given to congress to appoint peace officers to keep the peace upon the soil of the states. Yet section 2022 provides that these marshals and deputies shall keep the peace and preserve order at the polls.

§ 351. *Regulation of elections.*

To regulate the manner of an election is to provide the means by which each elector expresses his choice freely and without hindrance or obstruction. To say that the states may, under this provision of the fourth section, appoint judges of federal elections, designate the place where they shall sit during the day of the election, and that they cannot remove obstructions which on that day prevent the electors from reaching them, would be strange indeed. If the states can do so, the congress may, for the same powers by the constitution are given to each as to congressional elections. As an election, as we have above said, is the declared expression of the choice of the qualified electors, it is quite as necessary that no one but qualified electors should, as that they should themselves, be able to do so. Hence the regulations respecting registration are a part of the manner of the election, for they furnish a method by which those who hold the poll may discriminate between qualified and disqualified voters.

§ 352. *Reasons for the constitutional provision.*

The extent of the power given to the congress by this fourth section is readily seen from the reasons given for its adoption at the time of framing the constitution. Alexander Hamilton, in No. 59 of the Federalist, gives as a reason for its adoption, "that every government ought to contain in itself the means of its own preservation." According to his view, whatever was necessary to be done to enable the qualified voters of a state to freely express their choice for a representative in congress, the congress under the fourth section



has a right to provide. If, by any reason of hostility, the state determined to destroy the federal government by preventing the election of representatives in congress, either by a law forbidding its citizens to vote for such representatives, or by failing to regulate the time, place and manner of such election, since the federal government could not exist without a house of representatives, the power was given to congress to make and alter such time, place and manner. The federal government has as much right to exist since the adoption of the constitution which created it as the state governments have; whatever the latter may do to secure a full and free expression of the choice of state electors for candidates for state officers, the United States may do in respect to representatives in congress. Whether the hindrance or obstruction to a free expression of the choice of qualified electors for representatives in congress comes from an open act of hostility of the state or from the neglect to provide such a manner of election as to guard against such hindrance and obstruction, or from organized bands of its inhabitants conspiring together for the purpose, or from the act of one evil-disposed person only, the congress has the right, by virtue of the power given by this section, for the preservation of the national existence, which depends, as the life of all representative forms of government must, upon the freedom and purity of elections, to establish such regulations respecting the manner of conducting the election as will, in its judgment, prevent and remove them.

§ 353. *Discretion of marshals in exercising their functions under sections 2021, 2022, Revised Statutes.*

The marshal, therefore, and his special deputies were constitutionally charged with the duty of keeping the peace and of preserving order at the polls of this congressional election, and the question which arises is, Were they justified, upon the facts, in arresting Anton Schlauch, who was charged with being intoxicated, turbulent and noisy? We think the offense of Schlauch, even as stated by the deputy marshals, was but slight, but a large discretion must be given to an officer charged with the duty of keeping order at an election precinct. His duty is to prevent a disturbance as well as to suppress disorder after it has arisen, and as in this case the deputy used no harsh measures, and might well have supposed that the facts proved respecting the conduct of Schlauch would create a breach of the peace then, though at another time, at a place where there was less excitement, such conduct would have done no harm, and might have been passed over as the boisterous mirth of a jovial man excited by drink, yet the polling-place was not a proper place for its display. We are of opinion that the deputy was justified in his removal from the vicinity of the polling-place. The exercise of the elective franchise is not a frolic; it is the highest and most solemn duty of the citizen, and the deputy marshals appointed to keep the peace and preserve order at the time and place of its exercise will be sustained in preserving such a state of affairs at the polls as will enable the oldest, weakest, most infirm or timid of the electors to perform that duty. But by section 2022 of the Revised Statutes, the marshal and his special deputies are not only charged with the duty of keeping the peace and preserving order, but they are to prevent fraudulent voting.

Harris, one of the parties arrested, was a colored man. He was holding tickets headed by the devices of the republican ticket, with the names of the democratic candidates imprinted on them, and offering them to the colored voters as they approached the poll. Many of the voters were colored men who could not read. They were guided in their knowledge of the tickets by the

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pictures upon them, and they were offered to them by one of their own color. To give an ignorant elector a ticket with this device was, if he desired to vote for the republican and not the democratic candidate, to deprive him of his vote and to put a vote in the box for the opposing candidate by fraud. The deputy, we think, was justified in removing this cheat from the vicinity of the polling-place, not only because he was directed to prevent fraudulent voting, but because had this trick been discovered by the opposing party, it might then have led to an attempt to take his tickets from him, and to a consequent breach of the peace.

We have come to the conclusion that the act of congress under which these marshals and deputies were appointed is abundantly authorized by the fourth section of article I of the constitution of the United States, and that the conduct of the deputy marshals in the exercise of the powers conferred on them was both justifiable and discreet. We shall refuse the motion to quash, and enter an order discharging the petitioners.

§ 854. Powers of congress.—Under the power to regulate the time, place and manner of holding elections for representatives, congress may make such regulations that all the electors in every state shall have full and fair opportunity to declare their will. *United States v. Quinn*,\* 8 Blatch., 48. See § 321.

§ 355. The failure to exercise the power hitherto is no argument against its existence; and the grant of power is in nowise impaired by the fact that the states have legislated upon the subject. *Ibid.*

§ 356. Congress has power to interfere in the protection of voters at federal elections, and this power existed before the adoption of the recent amendments. *United States v. Crosby*, 1 Hughes, 448.

§ 357. As an elector, qualified to vote by the laws of the state, derives his right to vote for members of congress from section 2 of article 1 of the constitution of the United States, congress has power to protect him in that right. *United States v. Goldman*, 3 Woods, 187. See § 321.

§ 358. Section 4 of article 1 of the constitution of the United States, declaring that congress may, at any time, by law, make regulations prescribing the time, place, and manner of holding elections for senators and representatives, authorizes congress to make any law the purpose of which is to enable the voter to make a free and intelligent choice, and to express that choice freely at the ballot-box. *Ibid.*

§ 359. Section 5520 of the Revised Statutes, which declares it to be an offense "if two or more persons in any state or territory conspire to prevent, by force, intimidation or threat, any citizen who is lawfully entitled to vote from giving his support or advocacy in a legal manner toward or in favor of the election of any lawfully qualified person as an elector for president or vice-president of the United States, or as a member of the congress of the United States, or to injure any citizen in person or property, on account of such support or advocacy," is constitutional as an authorized exercise of the power of congress given by sections 2 and 4 of article 1, and the last clause of section 8 of the same article, of the constitution of the United States. *Ibid.*

§ 360. Appointment of supervisors.—The act of congress providing for the appointment by the courts of supervisors of elections does not impose upon the courts the performance of non-judicial functions, and its constitutionality cannot be questioned on that ground. *In re Citizens of Cincinnati*,\* 2 Flap., 228. See §§ 322, 324.

§ 361. Congress has the right to regulate the election of its own members, and the act providing for the appointment of supervisors to attend and witness the holding of the elections and the counting of the votes does not invade the rights of states, and is constitutional. *Ibid.*

§ 362. Civil rights bill.—Under the nineteenth section of the Civil Rights Act of May 31, 1870 (16 Statutes at Large, 144), it is not necessary, in order to constitute the offense, that the person complaining should be entirely prevented from voting; it is sufficient if he was hindered, or, as the statute puts it, that he was not allowed to vote "freely." So where a line of voters were waiting their turn to vote at an election, and were attacked and driven from the room, but afterwards returned and voted, it was held that the parties making the attack were guilty under this section. *United States v. Souder*, 2 Abb., 467. See § 1601.

§ 363. The nineteenth section of the Civil Rights Act of May 31, 1870 (16 Statutes at Large, 144), applies to elections for members of congress, and was intended to conserve their freedom and purity; and the fourth section of the same act applies to the election of state, county and municipal officers; and the words, "unlawfully preventing a voter from freely exercising the right of suffrage," in the nineteenth section, may be construed to mean "to unlawfully prevent him from voting," without bringing it into conflict with the fourth section. *Ibid.*

§ 364. Under section 2 of the Civil Rights Act of May 31, 1870 (16 Statutes at Large, 140), what amounts to a refusal or wilful omission to furnish to citizens an opportunity to perform the prerequisite required by statute to enable a citizen to vote, if challenged, depends upon the duties imposed upon the officers of election in that respect by the laws of the states. *McKay v. Campbell*, 2 Abb., 124. See IX, *infra*.

### 3. Taxation.

[See REVENUE; also X, 5, *infra*; §§ 848, 1026.]

**SUMMARY** — *Power to establish a bank*, § 365. — *States cannot tax agencies of federal government*, §§ 366-370. — *Power to tax bank circulation*, § 371. — *Direct taxes*, § 372. — *Liability of personal property*, § 373. — *Courts cannot declare tax excessive*, § 374. — *Power of congress to supply a currency*, §§ 371, 375. — *Tax on debts due non-residents*, § 376. — *State can only tax property in the state*, § 377. — *State tax on foreign-held bonds*, §§ 377-379. — *Liability of corporations*, § 379.

§ 365. Congress has authority, as incidental to its power to carry on the fiscal operations of the government, to establish a bank; and the act creating the United States Bank and its branches is constitutional. *McCulloch v. Maryland*, §§ 380-398. See BANKS; CORPORATIONS.

§ 366. The sovereign powers of taxation of the states do not extend to the means employed by congress to carry its powers into execution. Therefore a state tax upon a branch of the United States Bank is an infringement upon federal sovereignty and void. *Ibid.* See REVENUE.

§ 367. A state has no power by taxation or otherwise to retard, impede or burden the operation of the laws of congress enacted to carry into execution the powers vested in the general government. *Weston v. City Council of Charleston*, §§ 399-407.

§ 368. The power of taxation possessed by a state in its sovereign capacity does not extend to taxation of money invested in United States stock or bonds, such taxation being in violation of the provision granting power to congress "to borrow money on the credit of the United States," as having a tendency to obstruct congress in carrying out such power. *Ibid.*

§ 369. A state tax upon the capital of a bank, part or the whole of which is constituted by stock or bonds of the United States, is a tax upon the power of congress to borrow money to carry on the operations of the federal government, and therefore void. *Bank of Commerce v. New York City*, §§ 408-413; *Bank Tax Case*, §§ 414-416.

§ 370. The mere fact that congress has extended aid to a railroad corporation organized under state laws, both in the shape of large money advances and land grants, made contracts with it for services for the general government, and that the government has a limited interest in its income, does not exempt the railroad from state taxation, there being nothing in either the charter or the acts of congress indicative of such an exemption. *Thomson v. Pacific Railroad*, §§ 417-419.

§ 371. Congress may, in its power to regulate the currency, restrain all currency not issued under its authority, or tax circulation otherwise issued, though it be of a state bank. *Veazie Bank v. Fenno*, §§ 420-433. See MONEY.

§ 372. Direct taxes, referred to in the constitution, are limited to taxes on lands and polls. *Ibid.*

§ 373. Personal property is not the subject of taxation, except by general valuation and assessment. *Ibid.*

§ 374. The courts have no right to pronounce a tax laid by congress excessive. *Ibid.*

§ 375. Under the power to emit bills of credit, congress can supply a currency for the whole country. *Ibid.*

§ 376. A state may tax, in the hands of one of its resident citizens, a debt held by him upon a resident of another state, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the state in which the debtor resided. *Kirtland v. Hotchkiss*, §§ 434-436.

§ 377. The taxing power of a state is limited to persons, property and business within its jurisdiction. *State Tax on Foreign-held Bonds*, §§ 437-446.

§§ 378, 379. CONSTITUTION AND LAWS.—POWERS OF GOVERNMENT.

§ 378. Bonds issued by a railroad company are the property of the holder, and so far as they are held by non-residents they are beyond the jurisdiction of the state and its taxing power, although secured by mortgage on lands within the state; and an act requiring the treasurer of the company to retain five per cent. of the interest due to the bondholders for state taxes, is unconstitutional. *Ibid.*

§ 379. Corporations may be taxed upon their property and business, but the debts and obligations of a corporation are the property of its creditors, and can only be taxed in the hands of such creditors, and follow their domiciles, even though such obligations are secured by mortgage of real estate in the state where the imposition of the tax is attempted. *Ibid.*

[NOTES.—See §§ 447-470.]

M'CULLOCH v. STATE OF MARYLAND.

(4 Wheaton, 316-489. 1819.)

ERROR to the Court of Appeals of Maryland.

STATEMENT OF FACTS.—The question in this case arises on the validity of a tax imposed by an act of Maryland on a branch of the Bank of the United States. The Bank of the United States was incorporated by act of congress of April 10, 1816, and a branch bank was established at Baltimore. The Maryland act of February 11, 1818, was entitled "An act to impose a tax on all banks, or branches thereof, in the state of Maryland, not chartered by the legislature."

Opinion by MARSHALL, C. J.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union; and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has congress power to incorporate a bank? It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation. It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first congress elected under

the present constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance. These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.

§ 380. *The constitution of the United States, when adopted, bound the state sovereignties.*

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the constitution was, indeed, elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state, by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively and wisely on such a subject, by assembling in convention. It is true, they assembled in their several states; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments. From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

§ 381. *The powers delegated by the federal constitution to the states are to be exercised only by them.*

It has been said that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

§ 382. *The government of the United States is one of enumerated powers.*

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise as long as our system shall exist. In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

§ 383. *Though limited in power, the federal government is supreme within its sphere of action.*

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this constitution, and the laws of the United States which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."

§ 384. *The express powers delegated by the constitution to the federal government imply the ordinary means of execution thereof.*

Among the enumerated powers, we do not find that of establishing a bank

or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;" thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a

choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation. On what foundation does this argument rest? On this alone: The power of creating a corporation is one appertaining to sovereignty, and is not expressly conferred on congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects. The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

§ 385. *The federal and state governments are each sovereign with respect to the objects to each committed.*

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union and those of the states. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since, that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though ap-



pertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

§ 386. *Congress has discretionary, incidental power, by appropriate means, to carry its express powers into execution.*

But the constitution of the United States has not left the right of congress to employ the necessary means for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department thereof." The counsel for the state of Maryland have urged various arguments to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. In support of this proposition, they have found it necessary to contend that this clause was inserted for the purpose of conferring on congress the power of making laws. That, without it, doubts might be entertained whether congress could exercise its powers in the form of legislation. But could this be the object for which it was inserted? A government is created by the people, having legislative, executive and judicial powers. Its legislative powers are vested in a congress, which is to consist of a senate and house of representatives. Each house may determine the rule of its proceedings; and it is declared that every bill which shall have passed both houses shall, before it becomes a law, be presented to the president of the United States. The seventh section describes the course of proceedings by which a bill shall become a law; and, then, the eighth section enumerates the powers of congress. Could it be necessary to say that a legislature should exercise legislative powers in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned. But the argument on which most reliance is placed is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers to such as are indispensable and with-

out which the power would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.

§ 387. *The word "necessary" defined as it occurs in the constitution.*

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language that no word conveys to the mind, in all situations, one single, definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar from the tenth section of the first article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would

be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in congress may certainly be carried into execution without prescribing an oath of office. The power to exact this security for the faithful performance of duty is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted — that of fidelity to the constitution — is prescribed, and no other can be required. Yet he would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the constitution, such other oath of office as its wisdom might suggest.

So with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered “to provide for the punishment of counterfeiting the securities and current coin of the United States,” and “to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.” The several powers of congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

§ 388. *The analogy of the power to establish “postoffices and post-roads.”*

Take, for example, the power “to establish postoffices and post-roads.” This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one postoffice to another. And from this implied power has again been inferred the right to punish those who steal letters from the postoffice, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a postoffice and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offenses is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment. The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all

sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise. If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment? In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove that, in the absence of this clause, congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the state of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons: 1. The clause is placed among the powers of congress, not among the limitations on those powers. 2. Its terms purport to enlarge, not to diminish, the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," etc., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this

clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain, the powers of congress or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble. We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

§ 389. *To create a corporation, as an appropriate means of carrying into execution any of its express powers, is an incidental power of congress.*

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it. The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the third section of the fourth article of the constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," is not more comprehensive than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

§ 390. *To create a bank required for the fiscal operations of the government is an incidental power of congress.*

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one must be within the discretion of congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful and essential instrument in the prosecution of its fiscal operations is not now a subject of controversy. All those who have been concerned in the ad-

ministration of our finances have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, congress, justifying the measure by its necessity, transcended, perhaps, its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument as a means to effect the legitimate objects of the government.

§ 391. *The act of congress creating the United States Bank is constitutional; also the establishment of its branch banks.*

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution, or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power. After this declaration, it can scarcely be necessary to say that the existence of state banks can have no possible influence on the question. No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to state banks, and congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land. The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches, and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary. It being the opinion of the court that the act incorporating the bank is constitutional, and that the power of establishing

a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire:

§ 392. *The power of taxation is concurrent in the state and general governments.*

2. Whether the state of Maryland may, without violating the constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments, are truths which have never been denied. But such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports, the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used. On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case; but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds.

§ 393. *The federal constitution, and laws in pursuance thereof, are supreme, and control the state constitutions and laws.*

This great principle is, that the constitution, and the laws made in pursuance thereof, are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield, to that over which it is supreme. These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence and strength of argument seldom, if ever, surpassed have been displayed. The power of congress to create, and of course to continue, the bank was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and, like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction

no principle not declared can be admissible which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution. The argument on the part of the state of Maryland is not that the states may directly resist a law of congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it.

§ 394. *The taxing powers of a state extend within the limits of its sovereignty, and not beyond it.*

Before we proceed to examine this argument, and to subject it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representative to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature which claim the right to tax them, but by the people of all the states. They are given by all, for the benefit of all; and, upon theory, should be subjected to that government only which belongs to all. It may be objected to this definition that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

§ 395. *The sovereignty of the states does not extend over the means employed by congress to carry its constitutional powers into execution.*

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Con-



sequently, the people of a single state cannot confer a sovereignty which will extend over them. If we measure the power of taxation residing in a state by the extent of sovereignty which the people of a single state possess and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union for the execution of its powers. The right never existed, and the question whether it has been surrendered cannot arise.

§ 396. *A state has no power to obstruct by taxation the legitimate measures of the federal government.*

But, waiving this theory for the present, let us resume the inquiry whether this power can be exercised by the respective states, consistently with a fair construction of the constitution? That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government. But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests. In the legislature of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the meas-

ures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states. Gentlemen say they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the tenth section of the first article of the constitution; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged, what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument, the Federalist has been quoted, and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove, is stated with fullness and clearness. It is, "that an indefinite power of taxation in the latter (the government of the Union) might, and probably would, in time, deprive the former (the government of the states) of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it, the national government might at any time abolish the taxes imposed for state objects, upon the pretense of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments." The objections to the constitution which are noticed in

these numbers were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from state taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, "to the exclusion and destruction of the state governments." The arguments of the Federalist are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of state taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points they mean to prove. Had the authors of those excellent essays been asked whether they contended for that construction of the constitution, which would place within the reach of the states those measures which the government might adopt for the execution of its powers, no man who has read their instructive pages will hesitate to admit that their answer must have been in the negative.

§ 397. *Though the federal government may have the right to tax a state bank, it does not follow that a state may tax a bank chartered by the federal government.*

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole; between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme. But if the full application of this argument could be admitted, it might bring into question the right of congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States. The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

§ 398. *The law of Maryland, imposing a tax on the operations of the branch of the United States Bank, is unconstitutional.*

We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real prop-

erty of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

*Judgment reversed.*

WESTON v. CITY COUNCIL OF CHARLESTON.

(2 Peters, 449-480. 1829.)

ERROR to the Constitutional Court of South Carolina.

The plaintiffs in this case, being the owners of certain stock of the United States, applied to the state court for a prohibition to restrain the city council from taxing such stock. It was determined in the state court that such a tax would be valid.

Opinion by MARSHALL, C. J.

This case was argued on its merits at a preceding term; but a doubt having arisen with the court respecting its jurisdiction in cases of prohibition, that doubt was suggested to the bar, and a reargument was requested. It has been reargued at this term.

§ 399. *The word "final" in the twenty-fifth section of the judiciary act applies to all judgments and decrees which determine a particular case, and a judgment upon a prohibition proceeding, rendered by the highest tribunal of a state, is such a final judgment.*

The power of this court to revise the judgments of a state tribunal depends on the twenty-fifth section of the judicial act. That section enacts "that a final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had," "where is drawn in question the validity of a statute or of an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity," "may be re-examined and reversed or affirmed in the supreme court of the United States." In this case, the city ordinance of Charleston is the exercise of an "authority under the state of South Carolina," "the validity of which has been drawn in question on the ground of its being repugnant to the constitution," and "the decision is in favor of its validity." The question, therefore, which was decided by the constitutional court is the very question on which the revising power of this tribunal is to be exercised, and the only inquiry is, whether it has been decided in a case described in the section which authorizes the writ of error that has been awarded. Is a writ of prohibition a suit? The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass. The constitutionality of the ordinance is contested; the party aggrieved by it applies to a court; and at his suggestion a writ of prohibition, the appropriate remedy, is issued. The oppo-

site party appeals; and in the highest court the judgment is reversed and judgment given for the defendant. This judgment was, we think, rendered in a suit. We think, also, that it was a final judgment in the sense in which that term is used in the twenty-fifth section of the judicial act. If it were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import or than congress could have intended. Judgments in actions of ejectment, and decrees in chancery dismissing a bill without prejudice, however deeply they might affect rights protected by the constitution, laws or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties, and this court would not revise and correct the judgment. The word "final" must be understood in the section under consideration as applying to all judgments and decrees which determine the particular cause. We think, then, that the writ of error has brought the cause properly before this court.

§ 400. *A tax, under the authority of a state, upon United States government stock held by a citizen of such state, is unconstitutional.*

This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by states and corporations? Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract. If the states and corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence? But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands, of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, "to borrow money on the credit of the United States." Can anything be more dangerous or more injurious than the admission of a principle which authorizes every state and every corporation in the Union which possesses the right of taxation, to burden the exercise of this power at their discretion?

§ 401. — *if the right to tax exists, it has no limits.*

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods,

for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty, of the whole may depend, may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy. In a society formed like ours, with one supreme government for national purposes, and numerous state governments for other purposes, in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a state, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this court. In the performance of it, we have considered it as a necessary consequence, from the supremacy of the government of the whole, that its action, in the exercise of its legitimate powers, should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a state cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the states, united, may rightfully adopt. This subject was brought before the court in the case of *M'Culloch v. State of Maryland*, 4 Wheat., 316 (§§ 380–398, *supra*), when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that which is involved in this. It was discussed at the bar in all its relations, and examined by the court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was, that “all subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation.” “The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission;” but not “to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States.” “The attempt to use” the power of taxation “on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.”

§ 402. *A state has no power, by taxation or otherwise, to retard, impede or burden the operation of the laws of congress.*

The court said, in that case, that “the states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.” We retain the opinions which were then expressed. A contract made by the government, in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any state in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of *M'Culloch v. State of Maryland*, to be exempt from state taxation, and consequently from being taxed by corporations deriving their power from states. It is admitted that the power of the government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting

loans to the United States would be void, but a tax on them to any amount is allowable.

It is, we think, impossible not to perceive the intimate connection which exists between these two modes of acting on the subject. It is not the want of original power in an independent sovereign state to prohibit loans to a foreign government which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our constitution. The American people have conferred the power of borrowing money on their government, and, by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised. The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and has a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

It is admitted by the counsel for the defendants that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight, when urged against the application of an acknowledged power to tax government stock, than if urged against its application to lands sold by the United States. The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country, with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government stands, we think, on very different principles from a tax on lands which the government has sold. "The Federalist" has been quoted in the argument, and an eloquent and well-merited eulogy has been bestowed on the great statesman who is supposed to be the author of the number from which the quotation was made. This high authority was also relied upon in the case of *M'Culloch v. State of Maryland*, and was considered by the court. Without repeating what was then said, we refer to it as exhibiting our view of the sentiments expressed on this subject by the authors of that work. It has been supposed that a tax on stock comes within the exceptions stated in the case of *M'Culloch v. State of Maryland*. We do not think so. The Bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a state was supposed to be placed in the same condition with property acquired by an individual.

§ 403. *The ordinance of the city of Charleston, being subject to the objections above set forth, is void.*

The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution. We are therefore of

opinion that the judgment of the constitutional court of the state of South Carolina, reversing the order made by the court of common pleas, awarding a prohibition to the city council of Charleston to restrain them from levying a tax imposed on six and seven per cent. stock of the United States, under an ordinance to raise supplies to the use of the city of Charleston for the year 1823, is erroneous, in this: that the said constitutional court adjudged that the said ordinance was not repugnant to the constitution of the United States; whereas, this court is of opinion that such repugnancy does exist. We are therefore of opinion that the said judgment ought to be reversed and annulled, and the cause remanded to the constitutional court for the state of South Carolina, that further proceedings may be had therein according to law.

Dissenting opinion by MR. JUSTICE JOHNSON.

Entertaining different views on the questions in this cause from the majority of the court, and wishing generally that my reasons for my opinions on constitutional questions should appear where they cannot be misunderstood or misrepresented, I will briefly state the ground upon which I dissent from the decision now rendered.

§ 404. *A judgment upon a prohibition proceeding is not such a final judgment as is contemplated by the twenty-fifth section of the judiciary act.*

On the first point I am of opinion that the cause is not one within either the letter or the policy of the twenty-fifth section of the judiciary act. That the suggestion and motion to obtain a prohibition is a suit, in its general sense, cannot be questioned; but that is not enough to give this court jurisdiction; it must be a suit within the meaning and policy of the law which gives this writ of error. The words of the twenty-fifth section are, "a final judgment or decree on any suit;" from which I think it unquestionable that it must be a suit capable of terminating in a final judgment or decree. Now a prohibition, especially where it is refused, as in this case, is not final, and concludes nobody. If the party against which it was prayed goes on to carry into effect an unconstitutional law, he to whom it was refused is at liberty to bring his action of trespass, and the refusal of the prohibition would be no bar to his recovery. Indeed, in cases of prohibition, there is no *consideratum est*, no judgment entered, except, as well as I can recollect, in two cases; in that where it is first granted and then dissolved and a written consultation awarded authorizing the defendant to proceed; and in the case where the promovent is ruled to declare and the cause goes on to judgment in the usual form. When it is refused there is never a judgment entered, nor where it is granted in ordinary cases; and hence it is laid down generally that no writ of error lies in prohibition. There is no ground that I can perceive to suppose that congress intended any innovation in the ordinary rules of law as to suing out writs of error. On the contrary, in authorizing a writ of error to a final judgment in so many words, the legal conclusion is that they need not to adhere to the rule that a writ of error can only issue to recover a judgment as technically understood.

Again, the suit to which this section has relation must be a suit in which this court possesses or can exercise the power to enter judgment and award execution, because the latter part of the twenty-fifth section enacts, "that the supreme court may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution." Now, if the term execution here be taken in its ordinary technical meaning, this is not a case in which it can issue, the sole object of this prohibition being



to stay the proceedings of the city council and city sheriff under the law complained of; and if the issuing of a prohibition be considered as coming within the meaning of execution, as here used, then this court has no power to issue a prohibition to a state court, or state officer. Congress has not pretended to vest in it such authority. And I am well satisfied that this power has been withheld from the courts of the United States *ex industria*. For every provision in the constitution and the uniform policy of the government have been to prevent the immediate action of the one government upon the constituted authorities of the other, a collision which it was a leading object in the constitution to avoid, because its effects were unavoidably and fully anticipated. If it be asked, or has been argued, why may not this court proceed as far as it can proceed, and reverse the judgment of the state court, or enter a judgment for a prohibition, though it cannot issue it? I answer, simply because the case wants those distinctive features which are necessary to make out a case for the interference of this court under the twenty-fifth section. And I cannot imagine that the legislature would place this court in the unenviable dilemma of thus assuming ungranted powers, or of exercising jurisdiction in a case over which it could assume no coercive power. Hence I conclude that neither the letter nor the policy of the law sanctions us in exercising this jurisdiction. Nor is there the least necessity for it, since every beneficial end may be answered, when individuals are brought into controversy, by the ordinary proceedings under an unconstitutional law; and until this conflict of interest arise from the actual execution of process, the law remains a mere *brutum fulmen*. My views of the question of jurisdiction would exempt me from the necessity of giving an opinion on the constitutionality of the case under consideration. But I have no objection to expressing my opinion upon this question.

§ 405. *The tax imposed upon government stock by the city of Charleston is only an income tax, and does not impede the power "to borrow money," etc., and is constitutional.*

If I could bring myself to consider this question in the form in which it is considered by the majority of the court, I should certainly concur in the opinion that the tax was unconstitutional. For the exercise of a power which, under the mask of imposing a tax, may defeat or impede the operation of the government of the United States in borrowing money, could not be tolerated. But I am strongly impressed with the opinion that the record does not authorize this state of the question. It is true, the act of the city council of Charleston, which imposes this tax, is most clumsily worded. But I think it clear that, taken together, the object is to impose an income tax. This, I think, is necessarily inferred from the fact that the tax is not imposed upon money at interest generally, but only on so much as the individual has at interest above what he owes or pays an interest upon. The operation of this is to charge no more than his clear income for money at interest. It is objected that they make discriminations, and exempt from taxation state stock, city stock, and stock of their own chartered banks. But then they exempt also stock of the United States Bank; and there can be no better proof demanded to show that the law is conceived in the spirit of fairness, with a view to revenue, and no masked attack upon the powers of the general government. Had they, in fact, taxed any one of these excepted objects, we should have had the law brought up here as a violation of the obligation of contracts, since the statute books of the state will show that all their banks, with the exception of the state bank, have paid a bonus to the state. And it would have been impossible to tax the

state bank, because the stock is altogether owned by the state, and the laws of the council are subject to be repealed by the state.

As to the specification of six and seven per centum stock of the United States as objects of taxation, this also admits of an explanation, showing that the council acted in the spirit of fairness and candor, although certainly not happy in expressing the legislative mind. This specification became necessary from their imposing a tax by means of a percentage of twenty-five cents upon the capital at interest, instead of a percentage on the interest received. Hence, to have brought the four and three per centum stock of the United States under the tax would have been unequal and unjust; and there can be little doubt that to avoid this inequality was their object. I consider the case, therefore, as one of a tax upon income arising from the interest of money; a very unwise and suicidal tax, unquestionably, and not very judiciously arranged and expressed; but still, characterized by no unfairness, and no masked attack upon the powers of the general government. And, if so, with what correctness can it be characterized as unconstitutional? Why should not the stock of the United States, when it becomes mixed up with the capital of its citizens, become subject to taxation in common with other capital? Or, why should one who enjoys all the advantages of a society purchased at a heavy expense, and lives in affluence upon an income derived exclusively from interest on government stock, be exempted from taxation? No one imagines that it is to be singled out and marked as an object of persecution, and that a law professing to tax will be permitted to destroy;—this subject was sufficiently explained in *M'Culloch's case*. But why should the states be held to confer a bonus or bounty on the loans made by the general government? The question is not whether their stock is to be exposed to peculiar burdens, but whether it shall enjoy privileges and exemptions directly interfering with the power of the states to tax or to borrow. I can see no reason for the exemption, and certainly cannot acquiesce in it.

Dissenting opinion by MR. JUSTICE THOMPSON.

This case comes before us under the twenty-fifth section of the judiciary act of 1789, on a writ of error to the constitutional court of the state of South Carolina, the highest court of appeals in that state. The question in the state court arose upon proceedings commenced in an inferior court, and the issuing of a prohibition to restrain the city council of Charleston, and all other persons acting under their authority, from levying and collecting a tax on stock of the United States held by the appellants, on the ground that such a tax was a violation of the constitution of the United States. The prohibition having been granted by the inferior court, the order and judgment of that court were reversed in the constitutional court, thereby upholding the constitutionality of the tax.

§ 406. *A judgment upon a prohibition is not a final judgment in the contemplation of the judiciary act; and this court would have no power to enforce it, if it ordered the prohibition.*

A preliminary question has been raised, whether this court has jurisdiction of the case under the twenty-fifth section of the judiciary act. I think we have not. It is not a suit within the meaning of that section; and if it was, the writ of error is brought to reverse a judgment refusing to grant the prohibition. And if that judgment or order should be reversed here, this court has no power to enforce its judgment, or give the party any relief or protec-

tion against the imposition of the tax. But I shall not enter into an examination of this question; it is one of minor importance, as I understand this court does not claim the power of enforcing its judgment in any manner whatever, and the ordinance will remain in full force, and the payment of the tax be enforced, unless the city council shall voluntarily repeal it, and revoke the order to collect the tax. The judgment of this court is, therefore, no more than an opinion expressed upon an abstract question, and in its nature and effect only monitory.

§ 407. *A tax upon government stock, by authority of a state, is only a tax upon property acquired through one of the means employed by the government to carry on its operations, and is not prohibited by the constitution.*

In considering this case on the merits, it is to be borne in mind that this ordinance of the city council is subject to be repealed by the legislature of South Carolina, and, not having been done, we must consider it as having tacitly received the sanction of the legislature, and comes before us, therefore, with all the force and authority of a state law, and involves one of those delicate and difficult inquiries of conflicting powers between the general and state governments. It is necessary, in the first place, that we should understand the true character of this tax. Much importance seemed to be attached to this, both in the court below and on the argument here. In the opinion of the minority of the state court, which has been submitted to us by the appellants' counsel, as a part of his argument, it is said: "This ordinance does not affect to regard the tax as an income tax. It is a tax upon the United States stock *eo nomine*. As it is not a tax on income, it is unnecessary to inquire if the city council or a state have the power to tax income, and include therein the interest received on United States stock. The inquiry is, whether there is any such power to tax United States stock *eo nomine*." This distinction being so emphatically relied upon by the minority of the court, it is a fair inference that, if it had been considered a tax on income, it would not be objectionable on constitutional grounds. What are we to understand by its being a tax on United States stock *eo nomine*? Certainly, nothing more than that it is enumerated as one description, in a long list of specified property subject to taxation.

We have not the ordinance at large before us, but the clause upon which the question arises is stated as follows: All personal estate, consisting of bonds, notes, insurance stock, etc., etc., six and seven per centum stock of the United States, or other obligations, upon which interest has been or will be received during the year, over and above the interest which has been paid, twenty-five cents on every \$100. There is excepted out of this enumeration, stock of the state, stock of the city, and bank stock. But this exception cannot certainly affect the present question. No part of the constitution of the United States prohibits the states from exempting from taxation certain species of property, according to their own views of policy or expediency. What then is the ordinance, in substance? It is a tax upon the net income of interest upon money secured by bonds, notes, insurance stock, six and seven per centum stock of the United States, or other obligations, upon which interest has been received, etc. It is the net interest received upon which the tax is laid. For the ordinance declares the tax shall be on the interest received over and above that which has been paid. For example, he who receives \$1,000 interest, and pays out \$500 interest, is taxed only upon the balance. It is, therefore, a general tax upon an income from money at interest, and this, too, only included as one item in the enumeration of taxable property. It is not an objection that can be

made here, if anywhere, that the tax is not upon the whole income. It is a tax general in its application to income, from interest derived from investments of every description (with the exception mentioned), and money on loan. It cannot be considered as an exorbitant tax, or in any manner partaking of the character of a penalty, it being only a tax of a quarter of one per centum. If the objection to this tax is to be sustained, it must be on the broad ground that stock of the United States is not taxable in any shape or manner whatever; that it is not to be included in the estimate of property subject to taxation; and that I understand is the extent to which a majority of this court mean to carry the exemption. As I am unable to come to this conclusion, and it being a constitutional question of vital importance, I am constrained to dissent from the opinion of the court, and, contrary to my usual practice in ordinary cases, briefly to assign my reasons.

I shall, for the reason already mentioned, consider this ordinance as standing upon the same grounds precisely as if it had been a law of the state of South Carolina. It is not pretended that there is any express prohibition in the constitution of the United States which has been violated by this law. The only express limitation to the power of the individual states, to lay and collect taxes, is to be found in the tenth section of the first article of the constitution. "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, etc. No state shall, without the consent of congress, lay any duty of tonnage." The tax in question can certainly not fall within either of these prohibitions.

The objection to the tax is rested chiefly, if not entirely, upon that part of the eighth section of the first article which gives to congress the power "to borrow money on the credit of the United States." And it is said that, to permit the states to tax the stock, might, by possibility, sometimes embarrass the United States in procuring loans. In the examination of the powers of the general government under the constitution, the Federalist is often referred to as a work of high authority on questions of this kind, and the author has seldom been charged with surrendering any powers that can be brought fairly within the letter or spirit of the constitution. In No. 32 of that work, the writer, in discussing the subject of taxation, and the conflicts that might arise between the general and state governments, says: "Although I am of opinion that there would be no real danger of the consequences to the state governments, which seem to be apprehended from a power in the Union to control them in the levies of money, yet I am willing to allow, in its full extent, the justness of the reasoning which requires that the individual states should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its constitution. That a negation of the authority of the states to impose taxes on imports and exports is an affirmation of their authority to impose them on all other articles. That it is not a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty."

The power of the general government to borrow money on the credit of the United States is not only an express power granted to congress, but one that it must have been foreseen would be brought into practical operation, and that stock would of course be created; and yet it never entered into the discriminating mind of the writer referred to, that merely investing property, subject to taxation, in stock of the United States would withdraw the property from taxation. It is said the credit of the United States is a creation of the general government, which did not exist until they brought it into being, and in the production of which the state governments did not participate; that the states could not tax it before the constitution was formed, for it did not exist. This view of the subject is calculated to make an erroneous impression. It is true it did not exist in the shape of stock, but the property existed in some other form. No one procures stock without exchanging for it an equivalent in money or some other property; all which was doubtless subject to the payment of taxes. Exemption from taxation may hold out an inducement to invest property in stock of the United States, and might possibly enable the government to procure loans with more facility, and perhaps on better terms. But this possible or even certain benefit to the United States cannot extinguish pre-existing state rights. To consider this a tax upon the means employed by the general government for carrying on its operations is certainly very great refinement. It is not a tax that operates directly upon any power or credit of the United States. The utmost extent to which the most watchful jealousy can lead is that it may, by possibility, prevent the government from borrowing money on quite so good terms. And even this inconvenience is extremely questionable; for the stock only pays the same tax that the money with which it was purchased did. And whether the property exists in one form or the other, would seem to be matter of very little importance to the owner. But great injustice is done to others by exempting men who are living upon the interest of their money, invested in stock of the United States, from the payment of taxes; thereby establishing a privileged class of public creditors, who, though living under the protection of the government, are exempted from bearing any of its burdens. A construction of the constitution, drawing after it such consequences, ought to be very palpable before it is adopted.

But it seems to me that the right of the states to tax property of this description is admitted by the court in the case of *M'Culloch v. State of Maryland*, 4 Wheat., 436 (§§ 380-398, *supra*). The court there considered the tax imposed directly upon the operations of the bank, which was employed by the government as one of the means of carrying into execution its constitutional powers, and, in summing up the result, it is said the states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws of congress to carry into execution the powers vested in the general government; and yet the court say this opinion does not extend to a tax paid by the real property of the bank in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in the bank in common with other property of the same description throughout the state. In the case now before us, the tax is not direct upon any means used by the government to carry on its operations. It is only a tax upon property acquired through one of the means employed by the government to carry on its operations, namely, the power of borrowing money upon the credit of the United States;

and it is not perceived how any just distinction can be made in this respect between bank stock and stock of the United States; both are acquired through the medium of means employed by the government in carrying on its operations, and both are held as private property, and it is immaterial to the present question in what manner it was acquired.

The broad proposition (laid down in the case of *M'Culloch v. State of Maryland*), that the states cannot tax any instrument or means used by the general government in the execution of its powers, must be understood as referring to a direct tax upon such means or instrument; and that such was the understanding of the court is to be inferred from the exemption of bank stock from the operation of the rule; and the parallel cases put to illustrate the application of the doctrine lead to the same conclusion. Thus it is said the states cannot tax the mint; but this does not imply that they may not tax the money coined at the mint when held and owned by individuals. Again, it is said the states cannot tax a patent right; but if the patentee, from the sale or use of his patent, has acquired property or is receiving an income, it could not be intended to say that such property or income cannot be taken into the estimate of his taxable property. The unqualified proposition, that a state cannot directly or indirectly tax any instrument or means employed by the general government in the execution of its powers, cannot be literally sustained. Congress has power to raise armies, such armies are made up of officers and soldiers, and are instruments employed by the government in executing its powers; and although the army, as such, cannot be taxed, yet it will not be claimed that all such officers and soldiers are exempt from state taxation. Upon the whole, considering that the tax in question is a general tax upon the interest of money on loan, I cannot think it any violation of the constitution of the United States to include therein interest accruing from stock of the United States. I am accordingly of opinion that there is no error in the opinion of the state court.

#### BANK OF COMMERCE v. NEW YORK CITY.

(2 Black, 620-635. 1862.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the court of appeals of the state of New York. The question involved in this case is, whether or not the stock of the United States, constituting a part or the whole of the capital stock of a bank organized under the banking laws of New York, is subject to state taxation. The capital of the bank is taxed under existing laws in that state upon valuation like the property of individual citizens, and not, as formerly, on the amount of the nominal capital, without regard to loss or depreciation.

§ 408. *A tax upon the capital of a bank includes a tax upon United States bonds held by the bank. Such a tax cannot constitutionally be levied by a state.*

According to that system of taxation it was immaterial as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it. The tax was like one annexed to the franchise as a royalty for the grant. But since the change of this system, it is agreed the tax is upon the property constituting the capital. This stock, then, is held by the bank the same as such stocks are held by individuals, and alike subject to taxation or exemption by state authority. On the part of the bank it is claimed that the question was decided in the case of *Weston v. City Council of*

Charleston, 2 Pet., 449 (§§ 399-407, *supra*), in favor of exemption. In that case the stocks were in the hands of individuals which were taxed by the city authorities under a law of the state. The court held the law imposing the tax unconstitutional. This decision would seem not only to cover the case before us, but to determine the very point involved in it. It has been argued, however, that the form or mode of levying the tax under the ordinance of the city of Charleston was different from that of the law of New York, and hence may well distinguish the case and its principles from the present one. This difference consists in the circumstance that the tax in the former case was imposed on the stock *eo nomine*, whereas in the present it is taxed in the aggregate of the tax-payer's property, and to be valued at its real worth in the same manner as all other items of his taxable property. The stock is not taxed by name, and no discrimination is made in favor or against it, but is regarded like any other security for money or chose in action.

It is true that the ordinance imposing the tax in the case of *Weston v. City of Charleston* did discriminate between the stock of the United States and other property—that is, the ordinance did not purport to impose a tax upon all the property owned by the tax-payers of the city, and specially excepted certain property altogether from taxation. The only uniformity in the taxation was, that it was levied equally upon the articles enumerated, and which were taxed. To this extent it might be regarded as a tax on the stock *eo nomine*. But does this distinction thus put forth between the two cases distinguish them in principle? The argument admits that a tax *eo nomine*, or one that distinguishes unfavorably the stock of the United States from the other property of the tax-payer, cannot be upheld. Why? Because, as is said, if this power to discriminate be admitted to belong to the state, it might be exercised to the destruction of the value of the stock, and consequently of the power or function of the federal government to issue it for any practical uses.

§ 409. *Unless restricted by state constitutions, the legislatures can discriminate between kinds of property subject to taxation.*

It will be seen, therefore, that the distinction claimed rests upon a limitation of the exercise of the taxing power of the state; that if the tax is imposed indiscriminately upon all the property of the individual or corporation, the stock may be included in the valuation; if not, it must be excluded or cannot be reached. The argument concedes that the federal stock is not subject to the general taxing power of the state, a power resting in the discretion of its constituted authorities as to the objects of taxation and the amount imposed. It is true that in many, if not in all, of the constitutions of the states, provisions will be found confining the power of the legislature to the passage of uniform laws in the taxation of the real and personal property within her jurisdiction. But this is a restraint upon the power imposed by the state itself. In the absence of any such restriction discrimination in the tax would rest in the discretion of the legislature. Whether regulated by the constitution or by the act of the legislature is a question of state policy, to be determined by the people in convention or by the legislature. In either case the power to discriminate or not is in the state. How, then, can this limitation upon the taxing power of a state, which the argument assumes may be used to discriminate against the federal stocks, be enforced? The power to enforce it must be independent of the state to be effectual. There can be but one answer to this question, and that is: by the supreme judicial tribunal of the Union. But is this court a fit tribunal to sit in judgment upon the question whether the legislature of a state

has exercised its taxing power wisely or unwisely over objects of taxation, confessedly, as the argument assumes, within its discretion? And is the question a judicial question? We think not. There is, and must always be, a considerable latitude of discretion in every wise government in the exercise of the taxing power, both as to the objects and the amount, and of discrimination in respect to both. Property invested in religious institutions, seminaries of learning, charitable institutions, and the like, are examples. Can any court say that these are discriminations, which, upon the argument that seeks to distinguish the present from the case of *Weston v. City of Charleston*, would or would not take it out of that case? A court may appropriately determine whether property taxed was or was not within the taxing power, but if within, not that the power has or has not been discreetly exercised. We cannot, therefore, yield our assent to the soundness of the distinction taken by the counsel between this case and the one referred to.

§ 410. *A tax on United States stocks and bonds is a tax upon the power of congress to borrow money. No state can restrict that power.*

Upon looking at the case of *Weston v. City of Charleston*, it will be seen that the decision of a majority of the court was not at all placed upon the distinction we have been considering, but upon ground much broader and wholly independent of it. The tax upon the stocks was regarded as a tax upon the exercise of the power of congress "to borrow money on the credit of the United States." The exercise of this power was interfered with to the extent of the tax imposed by the city authorities, that the liability of the certificates of stock to taxation by a state in the hands of an individual affected their value in the market, and the free and unrestrained exercise of the power. The chief justice observes that, "if the right to impose a tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state or corporation may prescribe." He then refers to the taxing power of the state, its importance and extensive operation, and the delicacy and difficulty of fixing any limit to its exercise; and that in the performance of this duty, which had, in other cases, devolved on the court, it was considered as a necessary consequence of the supremacy of the federal government that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting powers of the states, and that the powers of a state cannot rightfully be so exercised as to impede and obstruct the free course of those measures which this government may rightfully adopt.

§ 411. *Extent of the taxing power of a state.*

He further observed that "the sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission, but not to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the power of taxation on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give;" and the chief justice then adds, "a contract made by the government, in the exercise of its powers to borrow money on the credit of the United States, is undoubtedly independent of the will of any state in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created." It is apparent, in studying this opinion in connection with the opinions of the court in the cases of *McCul-*



loch v. State of Maryland, 4 Wheat., 316 (§§ 380-398, *supra*), and of Osborn v. Bank of United States, 9 Wheat., 738 (§§ 2063-87, *infra*), that it is but a corollary from the doctrines so ably expounded by the chief justice in the two previous cases in the interpretation of an analogous power in the constitution.

§ 412. *The powers granted to the general government are supreme within their scope, and no state can trench upon any of those powers.*

The doctrine maintained in those cases is, that the powers granted by the people of the states to the general government, and embodied in the constitution, are supreme within their scope and operation, and that this government may exercise these powers in its appropriate departments, free and unobstructed by any state legislation or authority. That within this limit this government is sovereign and independent, and any interference by the state governments, tending to the interruption of the full legitimate exercise of the powers thus granted, is in conflict with that clause of the constitution which makes the constitution, and the laws of the United States passed in pursuance thereof, "the supreme law of the land." The result of this doctrine is, that the exercise of any authority by a state government trenching upon any of the powers granted to the general government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation; and more than this, if the encroachment or usurpation to any extent is admitted, the principle involved would carry the exercise of the authority of the state to an indefinite limit, even to the destruction of the power. For, as truly said by the chief justice in the case of *Weston v. City of Charleston*, in respect to the taxing power of the state, "if the right to impose the tax exists, it is a right which, in its nature, acknowledges no limit; it may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe."

An illustration of this principle in respect to the powers of the judicial department of this government is found in the case of *United States v. Peters*, 5 Cranch, 115. There the legislature of the state of Pennsylvania attempted to annul the judgment of a court of the United States, and destroy all rights acquired under it. It was quite apparent, if the exercise of that power could be admitted, the principle involved might annihilate the whole power of the federal judiciary within the state. The act of the legislature did not profess to exercise this power generally, but only in the particular case, on the ground that the court had no jurisdiction. But the chief justice, in giving the opinion of the court, very naturally observes that the right to determine the jurisdiction of the courts was not placed by the constitution in the state legislatures, but in the supreme judicial tribunal of the nation. If time allowed, many other cases might be referred to, illustrating the principle in respect to other departments of this government.

The conclusive answer to the attempted exercise of state authority in all these cases is, that the exercise is in derogation of the powers granted to the general government, within which, it is admitted, it is supreme. That government whose powers, executive, legislative or judicial, whether it is a government of enumerated powers like this one, or not, are subject to the control of another distinct government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the government, and the employment of them, are liable to constant interruption and possible annihilation. The case in hand is an illustration. The power to

borrow money on the credit of the United States is admitted. It is one of the most important and even vital functions of the general government, and its exercise a means of supplying the necessary resources to meet exigencies in times of peace or war. But of what avail is the function or the means if another government may tax it at discretion. It is apparent that the power, function, or means, however important and vital, are at the mercy of that government. And it must be always remembered, if the right to impose a tax at all exists on the part of the other government, "it is a right which in its nature acknowledges no limits." And the principle is equally true in respect to every other power or function of a government subject to the control of another.

§ 413. *Powers of the state and federal governments.*

In our complex system of government it is oftentimes difficult to fix the true boundary between the two systems, state and federal. The chief justice, in *McCulloch v. State of Maryland*, endeavored to fix this boundary upon the subject of taxation. He observed, "if we measure the power of taxation residing in a state by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property unimpaired, which leaves to a state the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states and safe for the Union." All will agree that this is the enunciation of a true principle, and it is only by a wise and forbearing application of it that the operation of the powers and functions of the two governments can be harmonized. Their powers are so intimately blended and connected that it is impossible to define or fix the limit of the one without at the same time that of the other in respect to any one of the great departments of government. When the limit is ascertained and fixed, all perplexity and confusion disappear. Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared. Judgment of the court below is reversed.

BANK TAX CASE.

(2 Wallace, 200-210. 1864.)

ERROR to the Court of Appeals of New York.

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—The question involved is, whether or not the stock of the United States, in which the capital of the Bank of the Commonwealth is invested, is liable to taxation by the state of New York, under an act passed by its legislature 29th of April, 1863, or, to state the question more directly, whether or not that act imposes a tax upon these stocks thus invested in the capital of the bank? It will be remembered that the previous act, the act of 1857, directed that the capital stock of the banks should be assessed and taxed *at its actual value*. By the present act, as is seen, the tax is imposed on a *valu-*

*ation equal to the amount of their capital paid in, or secured to be paid in, etc.* Looking at the two acts, and endeavoring to ascertain the alteration or change in the law from the language used, the intent of the law makers would seem to be quite plain, namely, a change simply in the mode of ascertaining or fixing the amount of the capital of the banks, which is made the basis of taxation. By the former the *actual value* of the capital, as assessed by the commissioners, is prescribed. By the latter, the capital paid in, or secured to be paid in, in the aggregate, is the valuation prescribed. By the former, the commissioners were bound to look into the financial condition of the banks, into the investments of their capital, losses and gains, and ascertain the best way they can the sum of present value as the basis of taxation. By the latter, they need only look into the condition of the banks in order to ascertain the amount of the capital stock paid in, or secured to be paid in; and this sum, in the aggregate, will constitute the basis. The rule of the present law is certainly more simple and fixed than that of the former and much less burdensome to the commissioners or assessors, and in its practical operation is, perhaps, as just. The former mode involved an inquiry into the whole of the financial operations of the bank, its several liabilities, and its available resources; often a complicated and difficult undertaking, and, at best, of uncertain results.

§ 414. *The banking law of 1838 considered.*

In order more fully to comprehend the meaning of the language used in the act of 1863, it may be well to refer, for a moment, to the system of the general banking law of 1838 and to the amendments of the same, under which these institutions have been organized. Any number of persons may associate to establish a bank under this law, but the aggregate amount of capital stock shall not be less than \$100,000. The instrument of association must specify, among other things, the amount of the capital stock of the association, and the number of shares into which the same shall be divided. It may also provide for an increase of their capital and of the number of the associates from time to time, as may be thought proper. The association is required to deposit with the superintendent of the bank department stocks of the state of New York or of the United States, or bonds and mortgages upon real estate, at a prescribed valuation, before any bills or notes shall be issued to it for circulation as currency. Nor can it commence the business of banking until these securities have been deposited to the amount of \$100,000. The public debt and bonds and mortgages are to be held by the superintendent exclusively for the redemption of the bills and notes put in circulation as money until the same are paid. And it is made the duty of the superintendent not to countersign any bills or notes for an association to an amount, in the aggregate, exceeding the public debt, or public debt and bonds and mortgages so pledged. It is true the associations are not obliged to invest more of their capital paid in in stocks, or stocks and bonds and mortgages, than is required as security, with the superintendent, for the bills and notes delivered for circulation as currency. The investment, however, cannot be for a less amount than \$100,000. It may exceed that limit. But this reference to the system shows that however large the amount of the capital of the association, fixed by its articles and paid in, the whole or any part of it may be lawfully invested in these stocks. The whole need not be used as a pledge for the redemption of the bills or notes as currency, as the issuing of these for circulation is only one branch of the business of banking. The banks, therefore, were but obeying the injunction of the law in investing the capital paid in in these stocks.

§ 415. *The capital of a bank is not distinguishable from the property in which it is invested.*

Now, when the capital of the banks is required or authorized by the law to be invested in stocks, and, among others, in United States stock, under their charters or articles of association, and this capital thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the *corpus* or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but, in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community. The legislature well knew the peculiar system under which these institutions were incorporated, and the working of it; and, when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the legislature to hold that such was not their intent in the enactment of the law.

We will add that we have looked with some care through the statutes of New York relating to the taxation of moneyed corporations, including the act of 1823, in which the first material change was made in the system, the act of 1825, the revision of 1830, the acts of 1857 and of 1863; and it will be seen in all of them that the tax is imposed on the property of the institutions, as contradistinguished from a tax upon their privileges or franchises. Since the act of 1825, the capital has been adopted as the basis of taxation, as furnishing the best criterion of the value of the property of which these institutions were possessed. Under their charters or articles of association, this amount was paid in, or secured to be paid in, by the stockholders or associates to the corporate body, or ideal person, constituting the capital stock, to be managed and disposed of by directors or trustees in furtherance of the objects and purposes for which the institutions were created. It constituted the fund raised by the incorporators with which the institutions began and carried on the particular business in which they were engaged. The injunction of the charters, which required this capital to be paid in, made it necessarily substantial property. The amount might fluctuate according to the good or ill fortune of the enterprise. It might become enhanced by gains in business, or diminished by losses; but, whether the one or the other, the tax in contemplation of the legislature and of the charters was imposed on the property of the institution consisting of its capital. In case of a permanent loss, a remedy against grievous taxation was always at hand by a reduction of the capital.

§ 416. *A tax upon the capital stock of a bank is a tax on the stock of the United States in which the capital stock is invested, and is unconstitutional.*

Having come to the conclusion that the tax on the capital of the Bank of the Commonwealth is a tax on the property of the institution, and which consists of the stocks of the United States, we do not perceive how the case can be distinguished from that of the Bank of Commerce v. New York City, 2 Black, 620 (§§ 408–413, *supra*), heretofore before this court. Judgment reversed, and the cause remitted, with directions to enter judgment in conformity with this opinion.

## THOMSON v. PACIFIC RAILROAD.

(9 Wallace, 579-592. 1869.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Kansas.

STATEMENT OF FACTS.—The question in this case is whether the property of the Union Pacific Railway Company is subject to taxation under the laws of Kansas. The bill is filed by Thomson and others, stockholders, against the railway company and certain county treasurers, to test the question.

The Union Pacific Railway Company was incorporated by the territory of Kansas in 1855, and assumed its present name under an act of the state in 1862. Subsequently it was incorporated by congress, with authority to construct a road from the hundredth meridian, to connect with the road of the Central Pacific Company. The company received grants of land and subsidies, and was to render services to the United States in carrying mails, troops and munitions of war. Congress did not attempt, however, to authorize the construction of a road in any state without the consent of the state. The corporation remained a state corporation.

Opinion by CHASE, C. J.

In this case the court has no concern with any of the connected roads which form, or are destined to form, links in the great chain of transcontinental railway. We have only to consider the liabilities and rights of the Union Pacific Railroad Company in respect to taxation under state legislation. Argument has been heard on behalf of some of the connected corporations, only because of their interest in the question, by reason of their similar situation and circumstances in reference to like legislation. The counsel for the complainants have justly said that the question certified here for decision is one of very grave importance. It was suggested, rather than argued, by one of them, that the property of the state is exempt by the state constitution from taxation; and that the state, having reserved to itself in the charter the right to purchase the road at the end of fifty years at a valuation then to be made, upon two years' notice to the company, has, therefore, a property in the road which cannot be taxed. But it is too plain for argument that the interest thus reserved is too remote and too contingent to be regarded as within the meaning of the exemption.

§ 417. *A corporation under contract relations with the United States is not exempt from state taxation, unless so specified. (a)*

The main argument for the complainants, however, is that the road, being constructed under the direction and authority of congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is therefore exempt from taxation under state authority. It is to be observed that this exemption is not claimed under any act of congress. It is not asserted that any act declaring such exemption has ever received the sanction of the national legislature. But it is earnestly insisted that the right of exemption arises from the relations of the road to the general government. It is urged that the aids granted by congress to the road were granted in the exercise of its constitutional powers to regulate commerce, to establish postoffices and post-roads, to raise and support armies, and to suppress insurrection and

(a) S. P., Railroad Co. v. Peniston, 18 Wall., 5. In this case it is held, that "exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers."

invasion; and that by the legislation which supplied aid, required security, imposed duties, and finally exacted, upon a certain contingency, a percentage of income, the road was adopted as an instrument of the government, and as such was not subject to taxation by the state.

The case of *McCulloch v. State of Maryland* (4 Wheat., 316; §§ 380–398, *supra*) is much relied on in support of this position. But we apprehend that the reasoning of the court in that case will hardly warrant the conclusion which counsel deduce from it in this. In that case the main questions were, whether the incorporation of the Bank of the United States, with power to establish branches, was an act of legislation within the constitutional powers of congress, and whether the bank and its branches, as actually established, were exempt from taxation by state legislation. Both questions were resolved in the affirmative. In deciding the first the court did not hold, as counsel suppose, that congress, under the constitution, has absolute and exclusive power to determine whether an act of legislation is or is not necessary and proper as a means for carrying into effect one or more of its enumerated powers. It defined the words “necessary and proper” as equivalent in meaning to the words “appropriate, plainly adapted, not prohibited, but consistent with the letter and spirit of the constitution;” and held that the incorporation of a bank with branches was a necessary and proper means to the effectual exercise of granted power within the definition thus given. It held further that congress was, within this limit, the exclusive judge as to the means best adapted to the end proposed, and that its choice of any means of the defined character was restricted only by its own discretion. But the question whether the particular means adopted was within the general grant of incidental powers was determined by the court. A great part of the argument was directed to the proposition that the incorporation of a bank was an exercise of incidental power within the true meaning of the terms “necessary and proper,” as explained by the court — an argument which would have been quite superfluous if that question was to be determined finally by the legislative and not by the judicial department of the government.

§ 418. — *congress might exempt it from such taxation as would impede its operation in the performance of the services due.*

We do not doubt, however, that upon the principles settled by that judgment, congress may, in the exercise of powers incidental to the express powers mentioned by counsel, make or authorize contracts with individuals or corporations for services to the government; may grant aids, by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the constitution; and may exempt, in its discretion, the agencies employed in such services from any state taxation which will really prevent or impede the performance of them. But can the right of this road to exemption from such taxation be maintained in the absence of any legislation by congress to that effect? It is unquestionably true that the court, in determining the second general question, already stated, did hold that the Bank of the United States, with its branches, was exempt from taxation by the state of Maryland, although no express exemption was found in the charter. But it must be remembered that the Bank of the United States was a corporation created by the United States, and, as an agent in the execution of the constitutional powers of the government, was endowed by the act of creation with all its faculties, powers and functions. It did not owe its existence or any of its qualities to state legislation. And its exemption from taxation was put upon this ground. Nor was the exemption

itself without important limitations. It was declared not to extend to the real property of the bank within the state, nor to interests held by citizens of the state in the institution.

In like manner other means and operations of the government have been held to be exempt from state taxation, as bonds issued for money borrowed (*Weston v. City of Charleston*, 2 Pet., 467; §§ 399-407, *supra*); certificates of indebtedness issued for money or supplies (*The Banks v. The Mayor*, 7 Wall., 24); bills of credit issued for circulation. *Bank v. Supervisors*, id., 28. There are other instances in which exemption, to the extent it is established in *McCulloch v. Maryland*, might have been held to arise from the simple creation and organization of corporations under acts of congress, as in the case of the national banking associations; but in which congress thought fit to prescribe the extent to which state taxation may be applied. *Van Allen v. The Assessors*, 3 id., 573; *Bradley v. The People*, 4 id., 459; *People v. Commissioners*, id., 244. In all these cases, as in the case of the Bank of the United States, exemption from liability to taxation was maintained upon the same ground. The state tax held to be repugnant to the constitution was imposed directly upon an operation or an instrument of the government. That such taxes cannot be imposed on the operations of the government is a proposition which needs no argument to support it. And the same reasoning will apply to instruments of the government, created by itself for public and constitutional ends. But we are not aware of any case in which the real estate, or other property of a corporation not organized under an act of congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.

It is true that some of the reasoning in the case of *McCulloch v. Maryland* seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the government of the United States. And even in respect to corporations organized under the legislation of congress, we have already held, at this term, that the implied limitation upon state taxation, derived from the express permission to tax shares in the national banking associations, is to be so construed as not to embarrass the imposition or collection of state taxes to the extent of the permission fairly and liberally interpreted. *National Bank v. Commonwealth*, 9 Wall., 353; *Lionberger v. Rouse*, 9 Wall., 468. We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch v. Maryland* beyond its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction and under state protection.

§ 419. *Difference between taxation of the property of an agency of the government and taxation of the agency.*

We do not doubt the propriety or the necessity, under the constitution, of maintaining the supremacy of the general government within its constitutional sphere. We fully recognize the soundness of the doctrine that no state has a "right to tax the means employed by the government of the Union for the execution of its powers." But we think there is a clear distinction between the means employed by the government and the property of agents employed

by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means. No one questions that the power to tax all property, business and persons, within their respective limits, is original in the states and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the national government; but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection. *Lane County v. Oregon*, 7 Wall., 77; *National Bank v. Commonwealth*, 9 Wall., 353. We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of state taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations more or less direct to the national government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to state taxation, if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the state governments.

The nature of the claims to exemption which would be set up is well illustrated by that which is advanced in behalf of the complainants in the case before us. The very ground of claim is in the bounties of the general government. The allegation is, that the government has advanced large sums to aid in construction of the road; has contented itself with the security of a second mortgage; has made large grants of land upon no condition of benefit to itself, except that the company will perform certain services for full compensation, independently of those grants; and will admit the government to a very limited and wholly contingent interest in remote net income. And because of these advances and these grants, and this fully compensated employment, it is claimed that this state corporation, owing its being to state law, and indebted for these benefits to the consent and active interposition of the state legislature, has a constitutional right to hold its property exempt from state taxation; and this without any legislation on the part of congress which indicates that such exemption is deemed essential to the full performance of its obligations to the government. We are unable to find in the constitution any warrant for the exemption from state taxation claimed in behalf of the complainants; and must therefore, answer the question certified to us in the affirmative.

VEAZIE BANK *v.* FENNO.

(8 Wallace, 533-556. 1869.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Maine.

STATEMENT OF FACTS.—The Veazie Bank issued notes for circulation, and refused to pay the ten per cent. tax imposed by the act of congress of July 13, 1866. Afterwards it paid the tax under protest, and then sued the collector.

Opinion by CHASE, C. J.

The necessity of adequate provision for the financial exigencies created by the late rebellion suggested to the administrative and legislative departments



of the government important changes in the systems of currency and taxation which had hitherto prevailed. These changes, more or less distinctly shown in administrative recommendations, took form and substance in legislative acts. We have now to consider, within a limited range, those which relate to circulating notes and the taxation of circulation. At the beginning of the rebellion the circulating medium consisted almost entirely of bank notes issued by numerous independent corporations, variously organized under state legislation, of various degrees of credit, and very unequal resources, administered often with great, and not unfrequently with little, skill, prudence and integrity. The acts of congress then in force prohibiting the receipt or disbursement, in the transactions of the national government, of anything except gold and silver, and the laws of the states requiring the redemption of bank notes in coin on demand, prevented the disappearance of gold and silver from circulation. There was, then, no national currency except coin; there was no general (see the act of December 27, 1854, to suppress small notes in the District of Columbia, 10 Stat. at Large, 599) regulation of any other by national legislation; and no national taxation was imposed in any form on the state bank circulation.

The first act authorizing the emission of notes by the treasury department for circulation was that of July 17, 1861 (12 Stat. at Large, 259). The notes issued under this act were treasury notes, payable on demand in coin. The amount authorized by it was \$50,000,000, and was increased by the act of February 12, 1862 (*id.*, 338), to \$60,000,000. On the 31st of December, 1861, the state banks suspended specie payment. Until this time the expenses of the war had been paid in coin or in the demand notes just referred to; and for some time afterwards they continued to be paid in these notes, which, if not redeemed in coin, were received as coin in the payment of duties. Subsequently, on the 25th of February, 1862 (*id.*, 345), a new policy became necessary, in consequence of the suspension and of the condition of the country, and was adopted. The notes hitherto issued, as has just been stated, were called treasury notes, and were payable on demand in coin. The act now passed authorized the issue of bills for circulation under the name of United States notes, made payable to bearer, but not expressed to be payable on demand, to the amount of \$150,000,000; and this amount was increased by subsequent acts to \$450,000,000, of which \$50,000,000 were to be held in reserve, and only to be issued for a special purpose, and under special directions as to their withdrawal from circulation. Act of July 11, 1862 (*id.*, 532); act of March 3, 1863 (*id.*, 710). These notes, until after the close of the war, were always convertible into, or receivable at par for, bonds payable in coin, and bearing coin interest, at a rate not less than five per cent., and the acts by which they were authorized declared them to be lawful money and a legal tender.

This currency, issued directly by the government for the disbursement of the war and other expenditures, could not, obviously, be a proper object of taxation. But on the 25th of February, 1863, the act authorizing national banking associations (act of March 3, 1863; 12 Stat. at Large, 670) was passed, in which, for the first time during many years, congress recognized the expediency and duty of imposing a tax upon currency. By this act a tax of two per cent. annually was imposed on the circulation of the associations authorized by it. Soon after, by the act of March 3, 1863 (*id.*, 712), a similar but lighter tax of one per cent. annually was imposed on the circulation of state banks in certain proportions to their capital, and of two per cent. on the excess; and the tax

on the national associations was reduced to the same rates. Both acts also imposed taxes on capital and deposits, which need not be noticed here. At a later date, by the act of June 3, 1864 (13 id., 111), which was substituted for the act of February 25, 1863, authorizing national banking associations, the rate of tax on circulation was continued and applied to the whole amount of it, and the shares of their stockholders were also subjected to taxation by the states; and a few days afterwards, by the act of June 30, 1864 (id., 277), to provide ways and means for the support of the government, the tax on the circulation of the state banks was also continued at the same annual rate of one per cent., as before, but payment was required in monthly instalments of one-twelfth of one per cent., with monthly reports from each state bank of the amount in circulation. It can hardly be doubted that the object of this provision was to inform the proper authorities of the exact amount of paper money in circulation, with a view to its regulation by law.

The first step taken by congress in that direction was by the act of July 17, 1862 (act of March 3, 1862; 12 Stat. at Large, 592), prohibiting the issue and circulation of notes under \$1 by any person or corporation. The act just referred to was the next, and it was followed some months later by the act of March 3, 1865, amendatory of the prior internal revenue acts, the sixth section of which provides "that every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of the notes of any state bank, or state banking association, paid out by them after the 1st day of July, 1866." 13 id., 484. The same provision was re-enacted with a more extended application on the 13th of July, 1866, in these words: "Every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of notes of any person, state bank, or state banking association, used for circulation, and paid out by them after the 1st day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue." 14 id., 146. The constitutionality of this last provision is now drawn in question, and this brief statement of the recent legislation of congress has been made for the purpose of placing in a clear light its scope and bearing, especially as developed in the provisions just cited. It will be seen that when the policy of taxing bank circulation was first adopted in 1863, congress was inclined to discriminate for rather than against the circulation of the state banks; but that when the country had been sufficiently furnished with a national currency by the issues of United States notes and of national bank notes, the discrimination was turned, and very decidedly turned, in the opposite direction.

The general question now before us is, whether or not the tax of ten per cent., imposed on state banks or national banks paying out the notes of individuals or state banks used for circulation, is repugnant to the constitution of the United States. In support of the position that the act of congress, so far as it provides for the levy and collection of this tax, is repugnant to the constitution, two propositions have been argued with much force and earnestness. The first is that the tax in question is a direct tax, and has not been apportioned among the states agreeably to the constitution. The second is that the act imposing the tax impairs a franchise granted by the state, and that congress has no power to pass any law with that intent or effect. The first of these propositions will be first examined.

§ 420. *The history of federal taxation.*

The difficulty of defining with accuracy the terms used in the clause of the

constitution which confers the power of taxation upon congress was felt in the convention which framed that instrument, and has always been experienced by courts when called upon to determine their meaning. The general intent of the constitution, however, seems plain. The general government, administered by the congress of the confederation, had been reduced to the verge of impotency by the necessity of relying for revenue upon requisitions on the states, and it was a leading object in the adoption of the constitution to relieve the government, to be organized under it, from this necessity, and confer upon it ample power to provide revenue by the taxation of persons and property. And nothing is clearer from the discussions in the convention and the discussions which preceded final ratification by the necessary number of states, than the purpose to give this power to congress, as to the taxation of everything except exports, in its fullest extent. This purpose is apparent, also, from the terms in which the taxing power is granted. The power is "to lay and collect taxes, duties, imposts and excises, to pay the debt and provide for the common defense and general welfare of the United States." More comprehensive words could not have been used. Exports only are by another provision excluded from its application.

There are, indeed, certain virtual limitations, arising from the principles of the constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government (*Lane County v. Oregon*, 7 Wall., 73) of the states, or if exercised for ends inconsistent with the limited grants of power in the constitution. And there are directions as to the mode of exercising the power. If congress sees fit to impose a capitation, or other direct tax, it must be laid in proportion to the census; if congress determines to impose duties, imposts and excises, they must be uniform throughout the United States. These are not strictly limitations of power. They are rules prescribing the mode in which it shall be exercised. It still extends to every object of taxation except exports, and may be applied to every object of taxation to which it extends, in such measure as congress may determine. The comprehensiveness of the power thus given to congress may serve to explain, at least, the absence of any attempt by members of the convention to define, even in debate, the terms of the grant. The words used certainly describe the whole power, and it was the intention of the convention that the whole power should be conferred. The definition of particular words, therefore, became unimportant. It may be said, indeed, that this observation, however just in its application to the general grant of power, cannot be applied to the rules by which different descriptions of taxes are directed to be laid and collected.

§ 421. *Direct taxes; how apportioned.*

Direct taxes must be laid and collected by the rule of apportionment; duties, imposts and excises must be laid and collected under the rule of uniformity. Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any

valuable light on the use of the words "direct taxes" in the constitution. We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use, and in the opinion of those whose relations to the government and means of knowledge warranted them in speaking with authority. And, considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear. It is, as we think, distinctly shown in every act of congress on the subject. In each of these acts a gross sum was laid upon the United States, and the total amount was apportioned to the several states, according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act, fixing its total sum.

§ 422. *Personal property not a subject of direct taxes, except by general valuation and assessment.*

In 1798, when the first direct tax was imposed, the total amount was fixed at two millions of dollars (act of July 14, 1798; 1 Stat. at Large, 597); in 1813 the amount of the second direct tax was fixed at three millions (act of August 2, 1813; 3 id., 53); in 1815 the amount of the third at six millions, and it was made an annual tax (act of July 9, 1815; id., 164); in 1816 the provision making the tax annual was repealed by the repeal of the first section of the act of 1815, and the total amount was fixed for that year at three millions of dollars (act of March 5, 1816; id., 255). No other direct tax was imposed until 1861, when a direct tax of twenty millions of dollars was laid and made annual (act of August 5, 1861; 12 id., 294); but the provision making it annual was suspended, and no tax, except that first laid, was ever apportioned. In each instance the total sum was apportioned among the states by the constitutional rule, and was assessed at prescribed rates on the subjects of the tax. These subjects, in 1798 (act of July 9, 1798; 1 Stat. at Large, 586), 1813 (act of July 22, 1813; 3 id., 26), 1815 (id., 166), 1816 (id., 255), were lands, improvements, dwelling-houses and slaves; and in 1861, lands, improvements and dwelling-houses only. Under the act of 1798, slaves were assessed at fifty cents on each; under the other acts according to valuation by assessors. This review shows that personal property, contracts, occupations, and the like, have never been regarded by congress as proper subjects of direct tax. It has been supposed that slaves must be considered as an exception to this observation. But the exception is rather apparent than real. As persons, slaves were proper subjects of a capitation tax, which is described in the constitution as a direct tax; as property they were, by the laws of some, if not most, of the states, classed as real property, descendible to heirs. Under the first view they would be subject to the tax of 1798 as a capitation tax; under the latter they would be subject to the taxation of the other years as realty. That the latter view was that taken by the framers of the acts, after 1798, becomes highly probable when it is considered that in the states where slaves were held, much of the value which would otherwise have attached to land passed into the slaves. If, indeed, the land only had been valued without the slaves, the land would have been subject to much heavier proportional imposition in those states than in states where there were no slaves; for the proportion of tax imposed on each state was determined by population, without reference to the subjects on which it was to be assessed. The fact, then, that slaves were valued, under the acts referred to, far from showing, as some have supposed, that congress regarded personal property as a proper object of direct taxation under the constitution, shows only

that congress, after 1798, regarded slaves, for the purposes of taxation, as realty.

§ 423. *Direct taxes, referred to in the constitution, are limited to taxes on lands and polls.*

It may be rightly affirmed, therefore, that in the practical construction of the constitution by congress, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls or capitation taxes. And this construction is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the convention which framed, and of the conventions which ratified, the constitution. What does appear in those discussions, on the contrary, supports the construction. Mr. Madison informs us (3 Madison Papers, 1337) that Mr. King asked what was the precise meaning of direct taxation, and no one answered. On another day, when the question of proportioning representation to taxation, and both to the white and three-fifths of the slave inhabitants, was under consideration, Mr. Ellsworth said: "In case of a poll tax there would be no difficulty;" and, speaking doubtless of direct taxation, he went on to observe: "The sum allotted to a state may be levied without difficulty, according to the plan used in the state for raising its own supplies." All this doubtless shows uncertainty as to the true meaning of the term direct tax; but it indicates also an understanding that direct taxes were such as may be levied by capitation, and on lands and appurtenances; or, perhaps, by valuation and assessment of personal property upon general lists. For these were the subjects from which the states at that time usually raised their principal supplies.

This view received the sanction of this court two years before the enactment of the first law imposing direct taxes *eo nomine*. During the February term, 1796, the constitutionality of the act of 1794, imposing a duty on carriages, came under consideration in the case of *Hylton v. United States*, 3 Dal., 171. Suit was brought by the United States against Daniel Hylton to recover the penalty imposed by the act for not returning and paying duty on a number of carriages for the conveyance of persons, kept by the defendant for his own use. The law did not provide for the apportionment of the tax, and, if it was a direct tax, the law was confessedly unwarranted by the constitution. The only question in the case, therefore, was whether or not the tax was a direct tax. The case was one of great expectation, and a general interest was felt in its determination. It was argued, in support of the tax, by Lee, attorney-general, and Hamilton, recently secretary of the treasury; in opposition to the tax, by Campbell, attorney for the Virginia district, and Ingersoll, attorney-general of Pennsylvania. Of the justices who then filled this bench, Ellsworth, Paterson and Wilson had been members, and conspicuous members, of the constitutional convention, and each of the three had taken part in the discussions relating to direct taxation. Ellsworth, the chief justice, sworn into office that morning, not having heard the whole argument, declined taking part in the decision. Cushing, senior associate justice, having been prevented, by indisposition, from attending to the argument, also refrained from expressing an opinion. The other judges delivered their opinions in succession, the youngest in commission delivering the first, and the oldest the last. They all held that the tax on carriages was not a direct tax, within the meaning of the constitution. Chase, justice, was inclined to think that the direct taxes contemplated by the constitution are only two: a capitation or poll tax, and a tax on land. He doubted whether a tax by a general assessment of personal prop-

erty can be included within the term direct tax. Paterson, who had taken a leading part in the constitutional convention, went more fully into the sense in which the words, giving the power of taxation, were used by that body. In the course of this examination he said:

“Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. If congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the states in the Union, then, perhaps, the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears from the practice of some of the states to have been considered as a direct tax. Whether it be so, under the constitution of the United States, is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal—I will not say the only—objects that the framers of the constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land.” 3 Dal., 177.

Iredell, J., delivering his opinion at length, concurred generally in the views of Justices Chase and Paterson. Wilson had expressed his views to the same general effect, when giving the decision upon the circuit, and did not now repeat them. Neither Chief Justice Ellsworth nor Justice Cushing expressed any dissent; and it cannot be supposed if, in a case so important, their judgments had differed from those announced, that an opportunity would not have been given them by an order for reargument to participate in the decision.

§ 424. *Capitation taxes, land taxes, and taxes on personal property by general assessment, the only subjects of direct taxation.*

It may be safely assumed, therefore, as the unanimous judgment of the court, that a tax on carriages is not a direct tax. And it may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the constitution, comprehended only capitation taxes and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several states. It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Pacific Ins. Co. v. Soule*, 7 Wall., 434, held not to be a direct tax.

§ 425. *Quære: Whether a franchise granted by a state is a subject of federal taxation.*

Is it, then, a tax on a franchise granted by a state, which congress, upon any principle exempting the reserved powers of the states from impairment by taxation, must be held to have no authority to lay and collect? We do not say that there may not be such a tax. It may be admitted that the reserved rights of the states, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of congress. But it cannot be admitted that franchises granted by a state are necessarily exempt from taxation;

for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a state, seem to be as properly objects of taxation as any other property.

§ 426. *The circulation of a state bank is a proper subject of taxation.*

But in the case before us the object of taxation is not the franchise of the bank, but property created or contracts made and issued under the franchise or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the state as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of congress, and not exempted by any relation to the state which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue.

§ 427. *The courts have no right to pronounce a tax laid by congress excessive.*

It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of congress. The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation or a class of corporations, it cannot, for that reason only, be pronounced contrary to the constitution.

§ 428. *Under the power to emit bills of credit, congress can supply a currency for the whole country.*

But there is another answer which vindicates equally the wisdom and the power of congress. It cannot be doubted that under the constitution the power to provide a circulation of coin is given to congress. And it is settled by the uniform practice of the government and by repeated decisions, that congress may constitutionally authorize the emission of bills of credit. It is not important here to decide whether the quality of legal tender in payment of debts can be constitutionally imparted to these bills; it is enough to say that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and congress has undertaken to supply a currency for the entire country. The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the national banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank,

as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will, perhaps, satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

§ 429. *In aid of a national currency congress can regulate and restrain all currency not issued under its own authority.*

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile. Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration.

The three questions certified from the circuit court of the district of Maine must, therefore, be answered affirmatively.

Dissenting opinion by MR. JUSTICE NELSON, MR. JUSTICE DAVIS concurring.

I am unable to concur in the opinion of a majority of the court in this case. The Veazie Bank was incorporated by the legislature of the state of Maine, in 1848, with a capital of \$200,000, and was invested with the customary powers of a banking institution; and, among others, the power of receiving deposits, discounting paper, and issuing notes or bills for circulation. The constitutional authority of the state to create these institutions, and to invest them with full banking powers, is hardly denied. But it may be useful to recur for a few moments to the source of this authority.

§ 430. *The states have power to charter banks of issue.*

The tenth amendment to the constitution is as follows: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." On looking into the constitution, it will be found that there is no clause or provision which either expressly, or by reasonable implication, delegates this power to the federal government, which originally belonged to the states, nor which prohibits it to them. In the discussions on the subject of the creation of the first bank of the United States, in the first congress, and in the cabinet of Washington, in 1790 and 1791, no question was made as to the constitutionality of the state banks. The only doubt that existed, and which divided the opinion of the most eminent statesmen of the day, many of whom had just largely participated in the formation of the constitution, the government under which they were then engaged in organizing, was, whether or not congress possessed a concurrent power to incorporate a banking institution of the United States. Mr. Hamilton, in his celebrated report on a national bank to the house of representatives, discusses at some length the question whether or not it would be expedient to substitute the Bank of North America, located in Philadelphia, and which had accepted a charter from the legislature of Pennsylvania, in the place of organizing a new bank. And, although he finally came to the conclusion to organize a new one, there is not a suggestion, or intimation, as to the illegality or unconstitutionality of this state bank.



The act incorporating this bank, passed February 25, 1791, prohibited the establishment of any other by congress during its charter, but said nothing as to the state banks. A like prohibition is contained in the act incorporating the Bank of the United States of 1816. The constitutionality of a bank incorporated by congress was first settled by the judgment of this court in *McCulloch v. State of Maryland*, 4 Wheat., 316 (§§ 380–398, *supra*), in 1819. In that case both the counsel and the court recognize the legality and constitutionality of banks incorporated by the states. The constitutionality of the Bank of the United States was again discussed, and decided in the case of *Osborn v. Bank of United States*, 9 id., 738 (§§ 2363–87, *infra*). And, in connection with this, was argued and decided a point in the case of *United States Bank v. Planters' Bank of Georgia*, which was common to both cases. The question was, whether the circuit court of the United States had jurisdiction of a suit, brought by the United States Bank against the Planters' Bank of Georgia, incorporated by that state, and in which the state was a stockholder (*id.*, 804, 904).

The court held in both cases that it had. Since the adoption of the constitution down to the present act of congress and the case now before us, the question in congress and in the courts has been, not whether the state banks were constitutional institutions, but whether congress had the power conferred on it by the states to establish a national bank. As we have said, that question was closed by the judgment of this court in *McCulloch v. State of Maryland*. At the time of the adoption of the constitution there were four state banks in existence and in operation — one in each of the states of Pennsylvania, New York, Massachusetts and Maryland. The one in Philadelphia had been originally chartered by the confederation, but subsequently took a charter under the state of Pennsylvania. The framers of the constitution were, therefore, familiar with these state banks, and the circulation of their paper as money, and were also familiar with the practice of the states, that was so common, to issue bills of credit, which were bills issued by the state, exclusively on its own credit, and intended to circulate as currency, redeemable at a future day. They guarded the people against the evils of this practice of the state governments by the provision in the tenth section of the first article, "that no state shall" "emit bills of credit," and, in the same section, guard against any abuse of paper money of the state banks in the following words: "nor make anything but gold and silver coin a tender in payment of debts." As bills of credit were thus entirely abolished, the paper money of the state banks was the only currency or circulating medium to which this prohibition could have had any application, and was the only currency, except gold and silver, left to the states. The prohibition took from this paper all coercive circulation, and left it to stand alone upon the credit of the banks.

It was no longer an irredeemable currency, as the banks were under obligation, including, frequently, that of the stockholders, to redeem their paper in circulation, in gold or silver, at the counter. The state banks were left in this condition by the constitution, untouched by any other provision. As a consequence, they were gradually established in most or all of the states, and had not been encroached upon or legislated against, or in any other way interfered with, by acts of congress, for more than three-quarters of a century — from 1787 to 1864. But, in addition to the above recognition of the state banks, the question of their constitutionality came directly before this court in the case of *Briscoe v. Bank of Commonwealth of Kentucky*, 11 Pet., 257 (§§ 539–558, *infra*). The case was most elaborately discussed both by counsel and the

court. The court, after the fullest consideration, held that the states possessed the power to grant charters to state banks; that the power was incident to sovereignty; and that there was no limitation in the federal constitution on its exercise by the states. The court observed that the Bank of North America and of Massachusetts and some others were in operation at the time of the adoption of the constitution, and that it could not be supposed the notes of these banks were intended to be inhibited by that instrument, or that they were considered as bills of credit within its meaning. All the judges concurred in this judgment, except Mr. Justice Story. The decision in this case was affirmed in *Woodruff v. Trapnall*, 10 How., 205; in *Darrington v. Bank of Alabama*, 13 id., 12, and in *Curran v. State of Arkansas*, 15 id., 317.

§ 431. *The issues of state banks are not "bills of credit."*

Chancellor Kent observes that Mr. Justice Story, in his Commentaries on the Constitution, vol. 3, p. 19, seems to be of opinion that independent of the long-continued practice, from the time of the adoption of the constitution, the states would not, upon a sound construction of the constitution, if the question was *res integra*, be authorized to incorporate banks with a power to circulate bank paper as currency, inasmuch as they are expressly prohibited from coining money. He cites the opinions of Mr. Webster, of the senate of the United States, and of Mr. Dexter, formerly secretary of war, on the same side. But the chancellor observes that the equal, if not the greater, authority of Mr. Hamilton, the earliest secretary of the treasury, may be cited in support of a different opinion; and the contemporary sense and uniform practice of the nation are decisive of the question. He further observes, the prohibition (of bills of credit) does not extend to bills emitted by individuals, singly or collectively, whether associated under a private agreement for banking purposes, as was the case with the Bank of New York, prior to its earliest charter, which was in the winter of 1791, or acting under a charter of incorporation, so long as the state lends not its credit, or obligation, or coercion to sustain the circulation.

In the case of *Briscoe v. Bank of Commonwealth of Kentucky*, he observes that this question was put at rest by the opinion of the court that there was no limitation in the constitution on the power of the states to incorporate banks, and their notes were not intended nor were considered *as bills of credit*. 1 Kent's Commentaries, p. 409, marg. note A, 10th ed. The constitutional power of the states, being thus established by incontrovertible authority, to create state banking institutions, the next question is, whether or not the tax in question can be upheld, consistently with the enjoyment of this power.

§ 432. *A tax on the bills of a bank is not a tax upon its property, but upon its debts.*

The act of congress, July 13, 1866 (14 Stat. at Large, 146, § 9), declares that the state banks shall pay ten per centum on the amount of their notes, or the notes of any person, or other state bank, used for circulation, and paid out by them after the 1st of August, 1866. In addition to this tax, there is also a tax of five per centum per annum upon all dividends to stockholders (13 id., p. 283, § 120), besides a duty of one twenty-fourth of one per centum, monthly, upon all deposits, and the same monthly duty upon the capital of the bank. Id., p. 277, § 110. This makes an aggregate of some sixteen per cent. imposed annually upon these banks. It will be observed, the tax of ten per centum upon the bills in circulation is not a tax on the property of the institutions.

The bills in circulation are not the property, but the debts, of the bank, and, in their account of debits and credits, are placed on the debit side. Certainly, no government has yet made the discovery of taxing both sides of this account, debit and credit, as the property of a taxable person or corporation. If both these items could be made available for this purpose, a heavy national debt need not create any very great alarm, neither as it respects its pressure on the industry of the country, for the time being, or of its possible duration. There is nothing in the debts of a bank to distinguish them in this respect from the debts of individuals or persons. The discounted paper received for the notes in circulation is the property of the bank, and is taxed as such, as is the property of individuals received for their notes that may be outstanding.

The imposition upon the banks cannot be upheld as a tax upon property; neither could it have been so intended. It is simply a mode by which the powers or faculties of the states, to incorporate banks, are subjected to taxation, and, which, if maintainable, may annihilate those powers. No person questions the authority of congress to tax the property of the banks, and of all other corporate bodies of a state, the same as that of individuals. They are artificial bodies, representing the associated pecuniary means of real persons, which constitute their business capital, and the property thus invested is open and subject to taxation, with all the property, real and personal, of the state. A tax upon this property, and which, by the constitution, is to be uniform, affords full scope to the taxing power of the federal government, and is consistent with the power of the states to create the banks, and, in our judgment, is the only subject of taxation, by this government, to which these institutions are liable.

§ 433. *The power to charter banks is reserved to the states and is protected by the constitution.*

As we have seen, in the forepart of this opinion, the power to incorporate banks was not surrendered to the federal government, but reserved to the states; and it follows that the constitution itself protects them, or should protect them, from any encroachment upon this right. As to the powers thus reserved, the states are as supreme as before they entered into the Union, and are entitled to the unrestrained exercise of them. The question as to the taxation of the powers and faculties belonging to governments is not new in this court. The bonds of the federal government have been held to be exempt from state taxation. Why? Because they were issued under the power in the constitution to borrow money, and the tax would be a tax upon this power; and, as there can be no limitation to the extent of the tax, the power to borrow might be destroyed. So, in the instance of the United States notes, or legal tenders, as they are called, issued under a constructive power to issue bills of credit, as no express power is given in the constitution, they are exempt from state taxation for a like reason as in the case of government bonds; and, we learn from the opinion of the court in this case, that one step further is taken, and that is, that the notes of the national banks are to be regarded as bills of credit, issued indirectly by the government; and it follows, of course, from this, that the banks used as instruments to issue and put in circulation these notes, are also exempt. We are not complaining of this. Our purpose is to show how important it is to the proper protection of the reserved rights of the states, that these powers and prerogatives should be exempt from federal taxation, and how fatal to their existence, if permitted. And, also, that even if this tax could be regarded as one upon property, still, under the decisions above.

referred to, it would be a tax upon the powers and faculties of the states to create these banks, and, therefore, unconstitutional.

It is true that the present decision strikes only at the power to create banks; but no person can fail to see that the principle involved affects the power to create any other description of corporations, such as railroads, turnpikes, manufacturing companies, and others. This taxation of the powers and faculties of the state governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of federal authority. It finds no support or countenance in the early history of the government, or in the opinions of the illustrious statesmen who founded it. These statesmen scrupulously abstained from any encroachment upon the reserved rights of the states; and, within these limits, sustained and supported them as sovereign states. We say nothing as to the purpose of this heavy tax of some sixteen per centum upon the banks, ten of which we cannot but regard as imposed upon the power of the states to create them. Indeed, the purpose is scarcely concealed, in the opinion of the court, namely, to encourage the national banks. It is sufficient to add, that the burden of the tax, while it has encouraged these banks, has proved fatal to those of the states; and, if we are at liberty to judge of the purpose of an act from the consequences that have followed, it is not, perhaps, going too far to say, that these consequences were intended.

KIRTLAND v. HOTCHKISS.

(10 Otto, 491-499. 1879.)

ERROR to the Supreme Court of Errors of Litchfield County, Connecticut.

STATEMENT OF FACTS.—Kirtland, a citizen of Connecticut, held certain bonds, executed at Chicago, Illinois, and secured by mortgage upon real estate in that city. The Connecticut authorities proposed to tax them, and he resisted, on the ground that the statute of the state under which the tax was claimed was repugnant to the constitution of the United States.

Opinion by MR. JUSTICE HARLAN.

We will not follow the interesting argument of counsel by entering upon an extended discussion of the principles upon which the power of taxation rests under our system of constitutional government. Nor is it at all necessary that we should now attempt to state all limitations which exist upon the exercise of that power, whether they arise from the essential principles of free government or from express constitutional provisions. We restrict our remarks to a single question, the precise import of which will appear from the preceding statement of the more important facts of this case.

§ 434. *Decisions on the subject of taxation.*

In *McCulloch v. State of Maryland*, 4 Wheat., 316 (§§ 380-398, *supra*), this court considered very fully the nature and extent of the original right of taxation which remained with the states after the adoption of the federal constitution. It was there said "that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it." Tracing the right of taxation to the source from which it was derived, the court further said: "It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are

objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation."

"This vital power," said this court in *Providence Bank v. Billings*, 4 Pet., 563 (§§ 2321-24, *infra*), "may be abused; but the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation." In *St. Louis v. Ferry Co.*, 11 Wall., 423, and in *State Tax on Foreign-held Bonds*, 15 id., 300 (§§ 437-446, *infra*), the language of the court was equally emphatic. In the last-named case we said that, "unless restrained by provisions of the federal constitution, the power of the state as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

§ 435. *This court can afford the citizen no relief against the taxation of his own state if it does not trench on the authority of the Union.*

We perceive no reason to modify the principles announced in these cases or to question their soundness. They are fundamental and vital in the relations which, under the constitution, exist between the United States and the several states. Upon their strict observance depends, in no small degree, the harmonious and successful working of our complex system of government, federal and state. It may, therefore, be regarded as the established doctrine of this court, that so long as the state, by its laws prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the constitution of the United States, this court, as between the state and its citizen, can afford him no relief against state taxation, however unjust, oppressive or onerous.

§ 436. *A state can tax its own residents on debts held against parties residing elsewhere. Such debts have their situs at the residence of their owner.*

Plainly, therefore, our only duty is to inquire whether the constitution prohibits a state from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another state, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the state in which the debtor resides. The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same state, to contribute for the support of the government whose protection he enjoys. That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt — the right to demand payment of the money loaned, with the stipulated interest — remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt; and, as held in *State Tax on Foreign-held Bonds*, *supra*, the right of the creditor "to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, . . . has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the state when held by a resident therein,"

etc. Cooley on Taxation, 15, 63, 134, 270. The debt, then, having its *situs* at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the state. It is, consequently, for the state to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard cannot be supervised or controlled by any department of the federal government, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the federal constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exercise by congress of the power to regulate commerce among the several states. *Nathan v. Louisiana*, 8 How., 73 (§§ 1035-37, *infra*); Cooley on Taxation, 62. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizen of life, liberty or property without due process of law, or violate the constitutional guaranty that the citizens of each state shall be entitled to all privileges of citizens in the several states.

Whether the state of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds or stocks which they may own (other than such as are exempted or protected from taxation under the constitution and laws of the United States), is a matter which concerns only the people of that state, with which the federal government cannot rightly interfere.

*Judgment affirmed.*

#### CASE OF THE STATE TAX ON FOREIGN-HELD BONDS.

##### RAILROAD COMPANY v. PENNSYLVANIA.

(15 Wallace, 800-826. 1872.)

ERROR to the Supreme Court of Pennsylvania.

STATEMENT OF FACTS.—The question in this case is whether a state can levy a tax on bonds issued by a corporation doing business in the state, the bonds being held by non-residents of the state. The railroad company was incorporated by Ohio, and authorized to build a road to the Pennsylvania line, and was further authorized by the state of Pennsylvania to construct a road from Erie to connect at the state line with its road in Ohio. The debt of the company was in bonds, and secured by three mortgages on the entire road, executed in 1854, 1859 and 1867, respectively. The bonds were executed and delivered at Cleveland, Ohio, the principal and interest of a part being payable in Philadelphia, and that of the balance being payable in the city of New York.

In 1868 the legislature of the state of Pennsylvania passed a law, making it the duty of the president, treasurer or cashier of every company, except banks or savings institutions, incorporated under the laws of the state, doing business in the state, and which paid interest to its bondholders or other creditors, to retain from such bondholders or creditors a tax of five per cent. upon every dollar of interest paid, and to pay over the same semi-annually to the state treasurer.

Under this law, and pursuant to a report of the treasurer of the company, the auditor-general and state treasurer proceeded to ascertain the amount due the state from the company, assigning to the part of the road in the state of

Pennsylvania an amount on the interest due on the whole debt in the proportion which that part bore to the whole road.

Opinion by MR. JUSTICE FIELD.

The question presented in this case for our determination is whether the eleventh section of the act of Pennsylvania of May, 1863, so far as it applies to the interest on bonds of the railroad company made and payable out of the state, issued to and held by non-residents of the state, citizens of other states, is a valid and constitutional exercise of the taxing power of the state, or whether it is an interference, under the name of a tax, with the obligation of the contracts between the non-resident bondholders and the corporation. If it be the former, this court cannot arrest the judgment of the state court; if it be the latter, the alleged tax is illegal, and its enforcement can be restrained.

§ 437. *Railroad Company v. Jackson*, 7 Wall., 262, explained.

The case before us is similar in its essential particulars to that of *Railroad Co. v. Jackson*, reported in 7 Wall., 262. There, as here, the company was incorporated by the legislatures of two states, Pennsylvania and Maryland, under the same name, and its road extended in a continuous line from Baltimore, in one state, to Sunbury, in the other. And the company had issued bonds for a large amount, drawing interest, and executed a mortgage for their security upon its entire road, its franchises and fixtures, including the portion lying in both states. Coupons for the different instalments of interest were attached to each bond. There was no apportionment of the bonds to any part of the road lying in either state. The whole road was bound for each bond. The law of Pennsylvania, as it then existed, imposed a tax on money owing by solvent debtors of three mills on the dollar of the principal, payable out of the interest. An alien resident in Ireland was the holder of some of the bonds of the railroad company, and when he presented his coupons for the interest due thereon, the company claimed the right to deduct the tax imposed by the law of Pennsylvania, and also an alleged tax to the United States. The non-resident refused to accept the interest with these deductions, and brought suit for the whole amount in the circuit court of the United States for the district of Maryland. That court, the chief justice presiding, instructed the jury that if the plaintiff, when he purchased the bonds, was a British subject, resident in Ireland, and still resided there, he was entitled to recover the amount of the coupons without deduction. The verdict and judgment were in accordance with this instruction, and the case was brought here for review.

This court held that the tax under the law of Pennsylvania could not be sustained, as to permit its deduction from the coupons held by the plaintiff would be giving effect to the acts of her legislature upon property and effects lying beyond her jurisdiction. The reasoning by which the learned justice who delivered the opinion of the court reached this conclusion may be open, perhaps, to some criticism. It is not perceived how the fact that the mortgage given for the security of the bonds in that case covered that portion of the road which extended into Maryland could affect the liability of the bonds to taxation. If the entire road upon which the mortgage was given had been in another state, and the bonds had been held by a resident of Pennsylvania, they would have been taxable under her laws in that state. It was the fact that the bonds were held by a non-resident which justified the language used, that to permit a deduction of the tax from the interest would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority

for the doctrine that property lying beyond the jurisdiction of the state is not a subject upon which a taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.

§ 438. *The taxing power of a state is limited to persons, property and business within the jurisdiction of the state.*

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape—in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal constitution, the power of the state as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

§ 439. *Corporations may be taxed upon their property and business, but the debts and obligations of a corporation are the property of its creditors, and can only be taxed in the hands of such creditors, and follow their domiciles.*

Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression, could add anything to its obvious truth, which is recognized upon its simple statement.

§ 440. *A state law taxing bonds held by non-residents is void.*

The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the state, they are property beyond the jurisdiction of the state. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and, under the pretense of levying a tax, commands the company to withhold a portion of the stipulated interest and pay it over to the state. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the



parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The act of Pennsylvania of May 1, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent. upon every dollar and pay it into the treasury of the commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution levied upon property held in other states where it is subjected, or may be subjected, to taxation upon an estimate of its full value.

§ 441. — *such bonds are not taxable on the ground that the loan is made valuable by franchises derived from the state, nor in consequence of their being secured by mortgage on property in the state.*

The case of *Maltby v. Reading & Columbia R. Co.*, decided by the supreme court of Pennsylvania in 1866, was referred to by the common pleas in support of its ruling, and is relied upon by counsel in support of the tax in question. The decision in that case does go to the full extent claimed, and holds that bonds of corporations held by non-residents are taxable in that state. But it is evident from a perusal of the opinion of the court that the decision proceeded upon the idea that the bond of the non-resident was itself property in the state because secured by a mortgage on property there. "It is undoubtedly true," said the court, "that the legislature of Pennsylvania cannot impose a personal tax upon the citizen of another state, but the constant practice is to tax property within our jurisdiction which belongs to non-residents." And again: "There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but when the property is within our jurisdiction, and enjoys the protection of our state government, it is justly taxable, and it is of no moment that the owner, who is required to pay the tax, resides elsewhere." There is no doubt of the correctness of these views. But the court then proceeds to state that the principle of taxation as the correlative of protection is as applicable to a non-resident as to a resident; that the loan to the non-resident is made valuable by the franchises which the company derived from the commonwealth, and as an investment rests upon state authority, and, therefore, ought to contribute to the support of the state government. It also adds that, though the loan is for some purposes subject to the law of the domicile of the holder, "yet, in a very high sense," it is also property in Pennsylvania, observing, in support of this position, that the holder of a bond of the company could not enforce it except in that state, and that the mortgage given for its security was upon property and franchises within her jurisdiction. The amount of all which is this: that the state which creates and protects a corporation ought to have the right to tax the loans negotiated by it, though taken and held by non-residents, a proposition which it is unnecessary to controvert. The legality of a tax of that kind would not be questioned if in the charter of the company the imposition of the tax were authorized, and in the bonds of the company, or its certificates of loan, the liability of the loan to taxation were stated. The tax in that case would be in the nature of a license tax for negotiating the loan, for in whatever manner made payable it would ultimately fall on the company as a condition of effecting the loan, and parties contracting with the company would provide for it by proper stipulations.

But there is nothing in the observations of the court, nor is there anything in the opinion, which shows that the bond of the non-resident was property in the state, or that the non-resident had any property in the state which was subject to taxation within the principles laid down by the court itself, which we have cited.

§ 442. — *the property paid a tax in the state, and the mortgage to the bondholder conveyed no title to him.*

The property mortgaged belonged entirely to the company, and, so far as it was situated in Pennsylvania, was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property nor its protection was augmented or diminished by the fact that the corporation was in debt or free from debt. The property in no sense belonged to the non-resident bondholder or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was both at law and in equity a mere security for the debt. That such is the nature of a mortgage in Pennsylvania has been frequently ruled by her highest court. In *Witmer's Appeal*, 45 Penn. St., 463, the court said: "The mortgagee has no estate in the land any more than the judgment creditor. Both have liens upon it, and no more than liens." And in that state all possible interests in lands, whether vested or contingent, are subject to levy and sale on execution, yet it has been held, on the ground that a mortgagee has no estate in the lands, that the mortgaged premises cannot be taken in execution for his debt. In *Rickert v. Madeira*, 1 Rawle, 329, the court said: "A mortgage must be considered either as a chose in action or as giving title to the land and vesting a real interest in the mortgagee. In the latter case it would be liable to execution; in the former it would not, as it would fall within the same reason as a judgment bond or simple contract. If we should consider the interest of the mortgagee as a real interest, we must carry the principle out and subject it to a dower and to the lien of a judgment; and that it is but a chose in action, a mere evidence of debt, is apparent from the whole current of decisions." *Wilson v. Shoenberger*, 31 Penn. St., 295.

§ 443. *A non-resident holder of a bond, secured by a mortgage on real estate in Pennsylvania, has no real estate there.*

Such being the character of a mortgage in Pennsylvania, it cannot be said, as was justly observed by counsel, that the non-resident holder and owner of a bond secured by a mortgage in that state owns any real estate there. A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged upon a given contingency, to enforce by its sale the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the state when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the state as the person of the owner.

§ 444. *Bonds and mortgages have no situs except at the domicile of their owner.*

It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have

acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners.

§ 445. *Cases reviewed.*

Cases were cited by counsel on the argument from the decisions of the highest courts of several states which accord with the views we have expressed. In *Davenport v. Mississippi & Missouri R. Co.*, 12 Ia., 539, the question arose before the supreme court of Iowa whether mortgages on property in that state held by non-residents could be taxed under a law which provided that all property, real and personal, within the state, with certain exceptions not material to the present case, should be subject to taxation, and the court said: "Both in law and equity the mortgagee has only a chattel interest. It is true that the *situs* of the property mortgaged is within the jurisdiction of the state, but the mortgage itself being personal property, a chose in action attaches to the person of the owner. It is agreed by the parties that the owners and holders of the mortgages are non-residents of the state. If so, and the property of the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the state, and if not, they are not the subject of taxation."

In *People v. Eastman*, 25 Cal., 603, the question arose before the supreme court of California whether a judgment of record in Mariposa county, upon the foreclosure of a mortgage upon property situated in that county, could be taxed there, the owner of the judgment being a resident of San Francisco, and the law of California requiring all property to be taxed in the county where situated; and it was held that it was not taxable there. "The mortgage," said the court, "has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may, at the same time, be secured by a mortgage upon land in every county in the state; and if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the state, and the mortgage in one county may be a different one from that in another, although the debt secured is the same."

Some adjudications in the supreme court of Pennsylvania were also cited on the argument, which appear to recognize doctrines inconsistent with that announced in *Maltby v. Reading & Columbia R. Co.*, particularly the case of *McKeen v. County of Northampton*, 49 Penn. St., 519, and the case of *Short's Estate*, 16 id., 63, but we do not deem it necessary to pursue the matter further. We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the state, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the state. Even where the bonds are held by residents of the state the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the state. When the property is

§§ 446-454. CONSTITUTION AND LAWS.— POWERS OF GOVERNMENT.

out of the state there can be no tax upon it for which the interest can be retained.

§ 446. *A state tax law has no extra-territorial force, and cannot be permitted to impair contracts made with non-residents.*

The tax laws of Pennsylvania can have no extra-territorial operation; nor can any law of that state inconsistent with the terms of a contract, made with or payable to parties out of the state, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extra-territorial invalidity of state laws discharging a debtor from his contracts with citizens of other states, even though made and payable in the state after the passage of such laws, has been judicially determined by this court. *Ogden v. Saunders*, 12 Wheat., 214 (§§ 1940-2003, *infra*); *Baldwin v. Hale*, 1 Wall., 223. A like invalidity must, on similar grounds, attend state legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the state.

Judgment reversed, and the cause remanded for further proceedings in conformity with this opinion.

JUSTICES DAVIS, CLIFFORD, MILLER and HUNT dissented, holding that the tax was valid. The dissent applied also to two other cases which arose under a law which was in force at the time the bonds were issued.

§ 447. *Forbidding suit to restrain collection of tax.*—Section 19 of the internal revenue act of July 13, 1866 (14 Statutes at Large, 152), as amended by the act of March 2, 1867 (*id.*, 475), which provides "that no suit to restrain the assessment or collection of a tax shall be maintained in any court," is not unconstitutional, either as taking private property for public use without compensation, or as conferring on others judicial power which, under the constitution, could be confided to courts alone. *Pullan v. Kinsinger*, 2 Abb., 105; *Cary v. Curtis*, 3 How., 244.

§ 448. *Penalty for false valuation.*—The act of congress directing the assessor of internal revenue to impose one hundred per centum additional on a tax for the return of a "false and fraudulent valuation" is constitutional and valid. *Doll v. Evans*,\* 15 Int. Rev. Rec., 144; 11 Am. L. Reg., 318.

§ 449. *Penalty for default in payment.*—The act of congress of June 7, 1862 (12 Statutes at Large, 422), imposing a penalty of fifty per cent. for a failure to pay the direct tax upon lands, was not unconstitutional. *De Treville v. Smalls*, 8 Otto, 527.

§ 450. *Requiring bond of distillers.*—Congress, under its power to levy and collect taxes, duties, imposts and excises, may require a bond as a condition precedent to the commencement of the business of rectifying or distilling, in order to render the collection of the tax due upon the business or product effectual, the only restriction being that it shall be a reasonable condition under the circumstances of the particular case. To prevent the secretion of the actual product of the business and the evasion of the tax, congress may prohibit the existence of a distillery within six hundred feet of rectifying establishments. *Mason v. Rollins*,\* 2 Biss., 99.

§ 451. *Conflict with federal authority.*—Whether or not the states have a right to levy a tax on the forts, navy yards, custom houses, etc., of the United States, they cannot enforce payment of such taxes by levying and seizing the personal property of the United States, and of their officers and servants. *United States v. Weise*, 2 Wall. Jr., 72. See § 366.

§ 452. When a telegraph company accepts the provisions of title 65 of the Revised Statutes of the United States, it becomes an agent of the United States, so far as telegraphic business transacted by it for the government is concerned, and a state tax on messages transmitted by the company for the government is unconstitutional and invalid. *Telegraph Co. v. Texas*, 15 Otto, 464.

§ 453. The act of congress of June 3, 1864, subjecting the shares of the capital of national banking associations to taxation by the states, without reference to the amount of such capital invested in bonds of the United States, exempt from state taxation, is constitutional. *Van Allen v. The Assessors*, 3 Wall., 573; *People v. The Commissioners*, 4 Wall., 244.

§ 454. Capital of a national bank invested in the securities of the United States cannot be taxed by the states. But the shares of the shareholder may be taxed, notwithstanding the

capital of the bank is invested in United States securities. And the states may require the bank to pay the tax which the stockholders owe to the states, on their shares, as this does not incapacitate the bank from discharging its duties to the United States. *National Bank v. Commonwealth*, 9 Wall., 258. See REVENUE.

§ 455. A state law taxing public lands between the time of their sale and the issue of the patent therefor is constitutional. *Carroll v. Safford*, 3 How., 461; *Carroll v. Perry*, 4 McL., 27.

§ 456. The general power to lay and collect taxes is a concurrent power. And the law of a state taxing or prohibiting a business already taxed by congress is not unconstitutional. *Per-year v. The Commonwealth*, 5 Wall., 475; *Twitchell v. Commonwealth*, 7 Wall., 321.

§ 457. Fairness of a tax not considered.—Where a court has under consideration the question whether a law imposing a tax is constitutional or not, the question of the fairness of the tax cannot be considered, but the sole question is as to the power of the legislature. *Minot v. Philadelphia, Wilmington, etc., R'y Co.*, 2 Abb., 339.

§ 458. Power of the states.—The constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. *Case of State Freight Tax*, 15 Wall., 232 (§§ 1255-62).

§ 459. The exercise of the authority which every state possesses, to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other states, and the tax is not on imports, exports or tonnage, or transportation to other states, cannot be regarded as conflicting with any constitutional power of congress. *The Delaware Railroad Tax*, 18 Wall., 206 (§§ 2328-35).

§ 460. It seems that a state legislature cannot prevent the citizens of its state from entering into such contracts as they choose outside the limits of the state. *Lamb v. Bowser*, 7 Biss., 318.

§ 461. A state legislature has no authority to authorize taxation for a purely private purpose, such as the establishment of a private manufacturing corporation. Taxation must be for a public purpose. *Commercial National Bank of Cleveland v. City of Iola*, 2 Dill., 359; *Parkersburg v. Brown*, 16 Otto, 501; *Olcott v. The Supervisors*,\* 16 Wall., 678.

§ 462. The legislature of a state may authorize a municipal corporation to borrow money for any public purpose, when there is nothing to the contrary in the constitution of the state. *Mitchell v. Burlington*, 4 Wall., 270.

§ 463. The act of the legislature of Missouri annexing to a certain town certain described lands, "to enable said town to take stock in a railroad," is not unconstitutional as authorizing a municipal corporation to tax, for its own local purposes, lands lying outside its corporate limits. *Henderson v. Jackson County*, 2 McC., 617.

§ 464. Congress has no power, under the constitution, to impose a tax upon the salary of a judicial officer of a state. *The Collector v. Day*, 11 Wall., 113.

§ 465. A railroad is not a means or instrument of state government within the prohibition of the constitution against the taxing of such means by the general government. *Sweatt v. Boston, Hartford, etc., R'y Co.*, 3 Cliff., 353.

§ 466. The law of congress (§ 3413, R. S.) imposing a tax of two per cent. on any bank, banker or association paying out the notes of any town, city or municipal corporation is constitutional and valid. The tax is not one on the obligation represented by the notes, but is designed to prevent the use of such notes as money, contrary to the policy of congress. *National Bank v. United States*, 11 Otto, 5.

§ 467. The eighth section of the first article of the constitution, giving to congress power to levy and collect taxes, duties, imposts and excises, authorizes taxation in the District of Columbia. The twentieth section of the first article, declaring that direct taxes shall be apportioned among the several states according to their respective numbers, is a standard for apportioning of taxes, and does not exempt from their operation the District of Columbia. The ninth section of the same article, that no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration, is likewise a standard for the apportioning of taxes, and applies to the District of Columbia. That section giving to congress the power of exercising "exclusive legislation in all cases whatsoever within this District," also confers the power to tax it. *Loughborough v. Blake*, 5 Wheat., 317.

§ 468. The "succession tax," imposed by the act of congress of 1864, is not a direct tax, within the meaning of either that clause of the constitution which provides that direct taxes shall be apportioned among the several states according to their respective numbers, or that provision requiring that no capitation or other direct tax shall be laid unless in proportion to the census or amended enumeration, but it is an excise tax or duty, authorized by that clause which vests in congress the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare. *Scholey v. Rew*, 23 Wall., 331.

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§ 469. The tax on carriages, imposed by the act of June 5, 1794 (1 Statutes at Large, 373), is not a direct tax within the meaning of that clause of the constitution which requires direct taxes to be levied in proportion to the population. *Hylton v. United States*, 3 Dal., 173.

§ 470. The twentieth section of the act of congress of 1868 provides as follows: "That on the receipt of the distiller's first return in each month, the assessor shall inquire and determine whether said distiller has accounted in his returns for the preceding month for all the spirits produced by him; and to determine the quantity of spirits thus to be accounted for, the whole quantity of materials used for the production of spirits shall be ascertained; and forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses. In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller, or other person liable, shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, together with the special tax of \$4 for every cask of forty proof gallons, and the collector shall proceed to collect the same as in case of other assessments for deficiencies; but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery, as estimated under the provisions of this act." This provision is held to be subject to no constitutional objection. The tax imposed is in the nature of an excise, and is uniform throughout the United States. *United States v. Singer*, 15 Wall., 111.

4. *Political Assessments.*

SUMMARY — *Act of August 15, 1876, constitutional*, § 471.

§ 471. The act of August 15, 1876, ch. 287, prohibiting the receiving of any political assessments by any executive officer, etc., from another, is constitutional, it being a legitimate exercise of the power vested in congress to promote efficiency and integrity in the public service. *Ex parte Curtis*, § 472.

EX PARTE CURTIS.

(16 Otto, 371-379. 1882.)

STATEMENT OF FACTS.—Curtis was indicted and convicted under the act of August 15, 1876, and applied for a writ of *habeas corpus* on the ground that the act was unconstitutional. The act made it a misdemeanor for any executive officer or employee of the United States, not appointed by the president, with the advice and consent of the senate, to request, give to or receive from any other officer or employee of the government any money or property or other thing of value for political purposes.

Opinion by WAITE, C. J.

The act is not one to prohibit all contributions of money or property by the designated officers and employees of the United States for political purposes. Neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges. That the government of the United States is one of delegated powers only, and that its authority is defined and limited by the constitution, are no longer open questions; but express authority is given congress by the constitution to make all laws necessary and proper to carry into effect the powers that are delegated. Art. 1, sec. 8. Within the legitimate scope of this grant congress is permitted to determine for itself what is necessary and what is proper.

§ 472. *The act of congress of August 15, 1876, chapter 287, section 6, is not unconstitutional.*

The act now in question is one regulating in some particulars the conduct of certain officers and employees of the United States. It rests on the same prin-

ciple as that originally passed in 1789 at the first session of the first congress, which makes it unlawful for certain officers of the treasury department to engage in the business of trade or commerce, or to own a sea vessel, or to purchase public lands or other public property, or to be concerned in the purchase or disposal of the public securities of a state or of the United States (R. S., sec. 243); and that passed in 1791, which makes it an offense for a clerk in the same department to carry on trade or business in the funds or debts of the states or of the United States, or in any kind of public property (*id.*, sec. 244); and that passed in 1812, which makes it unlawful for a judge appointed under the authority of the United States to exercise the profession of counsel or attorney, or to be engaged in the practice of the law (*id.*, sec. 713); and that passed in 1853, which prohibits every officer of the United States, or person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the government of the United States, or under the senate or house of representatives, from acting as an agent or attorney for the prosecution of any claim against the United States (*id.*, sec. 5498); and that passed in 1863, prohibiting members of congress from practicing in the court of claims (*id.*, sec. 1058); and that passed in 1867, punishing, by dismissal from service, an officer or employee of the government who requires or requests any workingman in a navy-yard to contribute or pay any money for political purposes (*id.*, sec. 1546); and that passed in 1868, prohibiting members of congress from being interested in contracts with the United States (*id.*, sec. 3739); and another, passed in 1870, which provides that no officer, clerk or employee in the government of the United States shall solicit contributions from other officers, clerks or employees for a gift to those in a superior official position, and that no officials or clerical superiors shall receive any gift or present as a contribution to them from persons in government employ getting a less salary than themselves, and that no officer or clerk shall make a donation as a gift or present to any official superior (*id.*, sec. 1784). Many others of a kindred character might be referred to, but these are enough to show what has been the practice in the legislative department of the government from its organization, and, so far as we know, this is the first time the constitutionality of such legislation has ever been presented for judicial determination.

The evident purpose of congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end. It is true, as is claimed by the counsel for the petitioner, political assessments upon office-holders are not prohibited. The managers of political campaigns, not in the employ of the United States, are just as free now to call on those in office for money to be used for political purposes as ever they were, and those in office can contribute as liberally as they please, provided their payments are not made to any of the prohibited officers or employees. What we are now considering is not whether congress has gone as far as it may, but whether that which has been done is within the constitutional limits upon its legislative discretion. A feeling of independence under the law conduces to faithful public service, and nothing tends more to take away this feeling than a dread of dismissal. If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as

a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty, growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, as to promote the political views of the contributor,—to avoid a discharge from service, not to exercise a political privilege. The law contemplates no restrictions upon either giving or receiving, except so far as may be necessary to protect, in some degree, those in the public service against exactions through fear of personal loss. This purpose of the restriction, and the principle on which it rests, are most distinctly manifested in section 1546, *supra*, the re-enactment in the Revised Statutes of section 3 of the act of June 30, 1868, c. 172, which subjected an officer or employee of the government to dismissal if he required or requested a workingman in a navy-yard to contribute or pay any money for political purposes, and prohibited the removal or discharge of a workingman for his political opinions; and in section 1784, the re-enactment of the act of February 1, 1870, c. 63, “to protect officials in public employ,” by providing for the summary discharge of those who make or solicit contributions for presents to superior officers. No one can for a moment doubt that in both these statutes the object was to protect the classes of officials and employees provided for from being compelled to make contributions for such purposes through fear of dismissal if they refused. It is true that dismissal from service is the only penalty imposed, but this penalty is given for doing what is made a wrongful act. If it is constitutional to prohibit the act, the kind or degree of punishment to be inflicted for disregarding the prohibition is clearly within the discretion of congress, provided it be not cruel or unusual.

If there were no other reasons for legislation of this character than such as relate to the protection of those in the public service against unjust exactions, its constitutionality would, in our opinion, be clear; but there are others, to our minds, equally good. If persons in public employ may be called on by those in authority to contribute from their personal income to the expenses of political campaigns, and a refusal may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in. So, too, if a part of the compensation received for public services must be contributed for political purposes, it is easy to see that an increase of compensation may be required to provide the means to make the contribution, and that in this way the government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage. Political parties must almost necessarily exist under a republican form of government; and when public employment depends to any considerable extent on party success, those in office will naturally be desirous of keeping the party to which they belong in power. The statute we are now considering does not interfere with this. The apparent end of congress will be accomplished if it prevents those in power from requiring help for such purposes as a condition to continued employment.

We deem it unnecessary to pursue the subject further. In our opinion the statute under which the petitioner was convicted is constitutional. The other objections which have been urged to the detention cannot be considered in this form of proceeding. Our inquiries in this class of cases are limited to such objections as relate to the authority of the court to render the judgment by



which the prisoner is held. We have no general power to review the judgments of the inferior courts of the United States in criminal cases by the use of the writ of *habeas corpus* or otherwise. Our jurisdiction is limited to the single question of the power of the court to commit the prisoner for the act of which he has been convicted. *Ex parte Lange*, 18 Wall., 163; *Ex parte Rowland*, 104 U. S., 604.

The commitment in this case was lawful, and the petitioner is consequently remanded to the custody of the marshal for the southern district of New York.

MR. JUSTICE BRADLEY dissented, holding that the act was an unconstitutional interference with the right of the citizen to propagate and promote his views on public affairs.

### 5. *Religious Liberty.*

SUMMARY — *Admission of Louisiana*, § 473. — *Not protected by constitution*, § 474.

§ 473. The admission of Louisiana into the Union, "on an equal footing with the other states," superseded all laws protecting religious liberty in that state, and left the matter to state regulation. *Permoli v. First Municipality*, §§ 475-477.

§ 474. The constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the constitution of the United States in this respect on the states. *Ibid.*

[NOTES. — See §§ 478, 479.]

#### PERMOLI v. FIRST MUNICIPALITY.

(8 Howard, 589-610. 1844.)

ERROR to the City Court of New Orleans.

STATEMENT OF FACTS. — The plaintiff in error, a Catholic priest, was prosecuted in the state court for the breach of an ordinance of the First Municipality of New Orleans. The ordinance in question imposed a penalty on any priest who should officiate at any funeral in any place other than a certain chapel. It was contended by the plaintiff in error that the ordinance was in conflict with the constitution of the United States.

Opinion by MR. JUSTICE CATRON.

As this case comes here on a writ of error to bring up the proceedings of a state court, before proceeding to examine the merits of the controversy, it is our duty to determine whether this court has jurisdiction of the matter.

§ 475. *The protection of the religious liberties of the people depends upon the constitutions and laws of the states.*

The ordinances complained of must violate the constitution or laws of the United States, or some authority exercised under them; if they do not, we have no power, by the twenty-fifth section of the judiciary act (1 Stats. at Large, 85), to interfere. The constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the constitution of the United States in this respect on the states. We must, therefore, look beyond the constitution for the laws that are supposed to be violated, and on which our jurisdiction can be founded; these are the following acts of congress: That of February 20, 1811, authorized the people of the territory of Orleans to form a constitution and state government; by section 3, certain restrictions were imposed in the form of instructions to the convention that

might frame the constitution; such as that it should be republican; consistent with the constitution of the United States; that it should contain the fundamental principles of civil and religious liberty; that it should secure the right of trial by jury in criminal cases, and the writ of *habeas corpus*; that the laws of the state should be published, and legislative and judicial proceedings be written and recorded in the language of the constitution of the United States. Then follows, by a second proviso, a stipulation reserving to the United States the property in the public lands, and their exemption from state taxation — with a declaration that the navigation of the Mississippi and its waters shall be common highways, etc.

§ 476. *The acts of congress admitting Louisiana into the Union do not give this court any jurisdiction of questions involving religious liberty in that state, nor does the ordinance of 1787.*

By the act of April 8, 1812, Louisiana was admitted according to the mode prescribed by the act of 1811; congress declared it should be on the conditions and terms contained in the third section of that act; which should be considered, deemed, and taken, as fundamental conditions and terms upon which the state was incorporated in the Union. All congress intended was, to declare in advance, to the people of the territory, the fundamental principles their constitution should contain; this was every way proper under the circumstances; the instrument having been duly formed and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did; or reject it if it did not. Having accepted the constitution, and admitted the state, “on an equal footing with the original states in all respects whatever,” in express terms, by the act of 1812, congress was concluded from assuming that the instructions contained in the act of 1811 had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the state constitution; if congress could make it in part, it might, in the form of amendment, make it entire. The conditions and terms referred to in the act of 1812 could only relate to the stipulations contained in the second proviso of the act of 1811, involving rights of property and navigation; and in our opinion were not otherwise intended.

§ 477. *The guaranty to the people of Orleans of the rights of the people of the northwest, by the ordinance of 1787, was superseded by the state constitution.*

The principal stress of the argument for the plaintiff in error proceeded on the ordinance of 1787. The act of 1805, c. 83, having provided that, from and after the establishment of the government of the Orleans territory, the inhabitants of the same should be entitled to enjoy all the rights, privileges and advantages secured by said ordinance, and then enjoyed by the people of the Mississippi territory. It was also made the frame of government, with modifications. In the ordinance, there are terms of compact declared to be thereby established, between the original states, and the people in the states afterwards to be formed northwest of the Ohio, unalterable, unless by common consent — one of which stipulations is, that “no person demeaning himself in a peaceable manner shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.” For this provision is claimed the sanction of an unalterable law of congress; and it is insisted the city ordinances above have violated it; what the force of the ordinance is north of the Ohio, we do not pretend to say, as it is unnecessary for the purposes of this case. But as regards the state of Louisiana, it had no further force, after the adoption of the state constitution, than other acts of congress organizing, in part, the territorial

government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights and secured civil and religious liberties (which are political rights), the laws of congress were all superseded by the state constitution; nor is any part of them in force unless they were adopted by the constitution of Louisiana as laws of the state. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory, during its existence. It follows, no repugnance could arise between the ordinance of 1787, and an act of the legislature of Louisiana, or a city regulation founded on such act; and therefore this court has no jurisdiction on the last ground assumed, more than on the preceding ones. In our judgment, the question presented by the record is exclusively of state cognizance, and equally so in the old states and the new ones, and that the writ of error must be dismissed.

§ 478. Religious liberty.—It seems that the prohibition of the constitution against restraining the free exercise of religion is not violated by state legislation giving equal aid to the votaries of every sect, or by establishing funds for the support of ministers, or public charities, or the endowment of churches, or the sepulture of the dead. *Terrett v. Taylor*, 9 Cr., 49.

§ 479. Section 5352 of the Revised Statutes, forbidding polygamy, and punishing it as a crime, in all the territories and other places over which the United States has jurisdiction, applies to the Mormons, and is constitutional, notwithstanding the members of that church believe it to be their religious duty to practice polygamy. *Reynolds v. United States*,\* 19 Alb. L. J., 92.

### 6. Crimes.

[As to Crimes and Criminal Procedure, see CRIMES.]

SUMMARY — *Embezzlement of pension money*, § 480. — *Passing counterfeit coin*, § 481.

§ 480. It is within the power of congress to pass pension laws, and to secure to pensioners the enjoyment of their pensions; and laws passed to punish guardians for embezzlement of pension money, paid to them for their wards, are constitutional. *United States v. Hall*, §§ 492-495.

§ 481. The states may provide for the punishment of fraudulently passing counterfeit coin. *Fox v. Ohio*, §§ 496-500. See § 501.

[NOTES.— See §§ 501-514.]

### UNITED STATES v. HALL.

(8 Otto, 343-359. 1878.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Southern District of Ohio.  
Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Pensions granted to children under sixteen years of age may, in certain cases, be paid to their guardians, and the act of congress provides that every guardian having the charge and custody of the pension of his ward, who embezzles the same in violation of his trust, or fraudulently converts the same to his own use, shall be punished by fine not exceeding \$2,000, or imprisonment at hard labor for a term not exceeding five years, or both. R. S., sec. 4783.

Sufficient appears to show that the defendant in the indictment is the guardian of William Williamson, who was at the time mentioned, and long before had been, entitled to a pension from the government of the United States, and that the defendant, as such guardian, had collected pension money belonging to his said ward as such pensioner, to the amount of \$500, for which he had never accounted, and which he had never expended for nor paid to his said

ward. Payment of the money being refused and withheld, an indictment against the defendant was returned by the grand jury of the circuit court, in which it is charged, among other things, that he, the respondent, being then and there the duly appointed guardian of William Williamson, who was entitled to a pension from the government of the United States, and having then and there, as such guardian, the charge and custody of the pension money belonging to said ward, did unlawfully and feloniously embezzle, in violation of his trust, a large sum of money, to wit, \$500, pension money belonging to his said ward, which he, the defendant, as such guardian, had theretofore collected from the government of the United States. Due appearance was entered by the defendant, and he demurred to the indictment. Hearing was had, and the following questions arose, upon which the judges of the circuit court were opposed in opinion, and the same were duly certified to this court:

1. Whether the circuit court has any jurisdiction over the alleged offense, or any power to punish the defendant for any appropriation of the money after its legal payment to him as such guardian, it appearing that the defendant is the legal guardian of his ward under the laws of the state; and that the money alleged to have been embezzled and fraudulently converted to his own use had been paid over to him by the government, and belonged to his said ward. 2. If the defendant did embezzle the money and convert the same to his own use after it was paid over to him by the government, is he liable to indictment for the offense under the act of congress, or only under the state law? 3. Is the act of congress under which the indictment is found a constitutional and valid law?

Preliminary to the examination of the questions certified into this court for decision, it is proper to remark that the court, in reproducing the questions exhibited in the transcript, has not preserved the exact phraseology in which they appear to have been framed, but it is believed that the form here adopted is, in substance and legal effect, the same as the questions certified from the court below. They present only two questions for decision which it is important to answer in any formal manner: 1. Whether the offense defined by the act of congress is committed when the embezzlement and conversion charged in the indictment did not take place until the pension money was paid over by the government to the defendant, as guardian of the ward. 2. Whether the act of congress defining the offense charged in the indictment is a valid law, passed in pursuance of the constitution.

Attempt is made, undoubtedly, to raise a third question as before explained; but it is so obvious that the act of congress would be invalid if it defined an offense as punishable in the courts of the United States which is justiceable only in the courts of the state, that it is not deemed necessary to give the question much consideration, it being clear that if the offense charged in the indictment is punishable only by the state law, then the defendant must prevail upon one or the other, or both, of the other two questions. Reasonable doubt upon that proposition cannot arise, and it is equally clear that if the answers to the first and third questions certified are adverse to the theory of the defendant, then the answer to the second question must be in the negative, which is all that need be said upon the subject.

§ 482. *Jurisdiction of United States circuit courts over crimes and offenses.*

Circuit courts have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where the acts of congress otherwise provide, and concurrent jurisdiction with the district courts of the

crimes and offenses cognizable in those courts. 1 Stat., 79; R. S., sec. 629, p. 112. Such courts possess no jurisdiction over crimes and offenses committed against the authority of the United States, except what is given to them by the power that created them; nor can they be invested with any such jurisdiction beyond what the power ceded to the United States by the constitution authorizes congress to confer,—from which it follows that before an offense can become cognizable in the circuit court the congress must first define or recognize it as such, and affix a punishment to it, and confer jurisdiction upon some court to try the offender. *United States v. Hudson*, 7 Cranch, 32; *United States v. Coolidge*, 1 Wheat., 415; 1 Am. Cr. L., sec. 163. Courts of the kind were not created by the constitution, nor does the constitution invest them with any criminal jurisdiction. Even the powers of an express character given to congress upon the subject embrace only a limited class of well-known offenses. Congress may provide for the punishment of counterfeiting the securities and current coin of the United States, and may pass laws to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. Treason is defined by the constitution, but it has never been decided that the offender could be tried and punished for the offense until some court is vested with the power by an act of congress.

§ 483. *Implied power of congress to define and punish crimes.*

Implied power in congress to pass laws to define and punish offenses is also derived from the constitutional grant to congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the land and naval forces, and to provide for organizing, arming and disciplining the militia and for governing such parts of them as may be employed in the public service. Like implied authority is also vested in congress from the power conferred to exercise exclusive jurisdiction over places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, and from the clause empowering congress to pass all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or any department or officer thereof.

§ 484. *Power of congress to pass pension laws.*

Power to grant pensions is not controverted, nor can it well be, as it was exercised by the states and by the continental congress during the war of the Revolution; and the exercise of the power is coeval with the organization of the government under the present constitution, and has been continued without interruption or question to the present time. Five days after the act passed organizing the judicial system of the United States, congress enacted that the military pensions which have been granted and paid by the states respectively, in pursuance of an act of the United States in congress assembled, shall be continued and paid by the United States from the 4th day of March last for the space of one year, under such regulation as the president may direct. 1 Stat., 95. Before that provision expired, to wit, on the 5th of July of the next year, congress enacted that military pensions granted and paid by the states in pursuance of former acts of congress or of acts passed in the then present session, to invalids who were wounded or disabled during the late war, shall be continued and paid by the United States for one year from the 4th of March preceding the approval of the act. *Id.*, 129. Seven years' half-pay of certain deceased officers was granted to their widows or orphans, which grant it was

supposed was barred by a subsequent resolution; and the congress, on the 23d of March, 1792, passed an act that the right to prosecute the claims should be extended for and during the term of two years from the passing of the act giving the extension, and made further provision for placing other officers, commissioned and non-commissioned, and soldiers and seamen disabled in actual military service during the late war, on the pension list during life or the continuance of such disability. *Id.*, 244.

§ 485. *Pension laws of the United States.*

Reference is made to these early acts of congress in order to show that the pension system of the country had its origin in the Revolution, and beyond all question was sanctioned by the framers of the constitution who were members of the first congress and enacted the laws for putting the new government into operation. Other acts of congress of a like character were passed granting pensions to the officers and soldiers disabled in the war of 1812, and in the Mexican war, and in the more recent war of the rebellion. Fresh as these laws are in the memory of every one, it is not necessary to refer to the volumes where they are found, as the public statutes of the United States are full of such provisions; nor should it be forgotten that some of these laws throughout the same period have been passed by congress in favor of the disabled officers and seamen of the navy. Suppose that is so, still it is insisted that the circuit court had no jurisdiction of the offense alleged in the indictment, which involves both the construction of the act of congress defining the offense, and the power of congress to pass the law, which latter point will more appropriately be considered when the third question presented for decision is examined.

§ 486. *Construction of the pension embezzlement act.*

Guardians having the charge and custody of the pensions of their wards, who embezzle the same in violation of their trust, or fraudulently convert the same to their own use, are the material words of the enactment; and the proposition is, that the circuit court has no power to punish the defendant for any appropriation by him of said money after its legal payment to him as such guardian, which to a demonstration is a mistake, if the act of congress is a valid and constitutional act, for several reasons, each of which is sufficient to show that the proposition is unsound: 1. Because the guardian has not, and cannot have, in the nature of things, the charge and custody of the pension money of his ward until it is paid to him by the government. 2. Because he cannot, within the meaning of the act of congress, embezzle the pension money of his ward, or fraudulently convert the same to his own use in violation of his trust, before the same is paid to him as such guardian. 3. Because, if the theory of the defendant is correct, the act of congress defines certain acts of such a guardian as an offense that in the nature of things is practically impossible, which would show that the act of congress is an absurdity. 4. Because the plain import and obvious meaning of the language of the provision contradicts the theory of the defendant, and shows that congress intended to protect the pension money as a fund for the ward after it was paid to the guardian, and to punish the depository if he embezzled or fraudulently converted it to his own use before he rendered an account for it or expended it for the benefit of the ward, as the law required.

Viewed in the light of these suggestions, it follows that the offense set forth in the indictment is well defined in the act of congress, and that the offense as there defined, if the act of congress is valid and constitutional, consists of em-

bezzling the pension of the ward by the guardian, or of fraudulently converting the same to his own use after the same is paid to him by the government. Argument to show that the circuit courts have jurisdiction of offenses against the authority of the United States since the passage of the judiciary act is unnecessary, as all the offenses cognizable in those courts have been defined since the judiciary act went into operation. Grant all that, and still the question is whether the act defining the offense set forth in the indictment is a valid and constitutional act.

§ 487. *The act of congress declaring the embezzlement by a guardian of his ward's pension money to be a crime, and vesting in the circuit courts the power to punish it, is constitutional.*

Briefly stated, the objections to the constitutionality of the law are as follows: 1. That it is municipal in its character, operating directly on the conduct of individuals, and that it assumes to take the place of ordinary state legislation. 2. That if congress may pass such a law, then congress may assume all the police regulations of the states, and work their entire destruction. 3. That inasmuch as the state law authorized the guardian to receive the pension money, the defendant cannot be subjected to an indictment under an act of congress for embezzling it after he lawfully received it. 4. That matters of police regulation are not surrendered to congress, but are exclusively within state legislation. 5. That a guardian is a state officer, and as such is not subject to the laws of congress in the performance of his duties. Power to protect the fund from misappropriation, fraud and unauthorized conversion to the use of another, and to secure its safe and unimpaired transmission to the beneficiary, has been claimed and exercised through the whole period since congress, under the constitution, commenced to grant such bounties.

Provision was made by the sixth section of the act of the 25th of March, 1792, that no sale, transfer or mortgage of the whole or any part of the pension or arrearages of pension payable to any non-commissioned officer, soldier or seaman, before the same shall become due, shall be valid; and the same section also provided that every person claiming such pension or arrears of pension, or any part thereof, under power of attorney or substitution, shall, before the same is paid, make oath or affirmation before some justice of the peace of the place where the same is payable, that such power or substitution is not given by reason of any transfer of such pension or arrears of pension; and any person who shall swear or affirm falsely in the premises, and be thereof convicted, shall suffer as for wilful and corrupt perjury. 1 Stat., 245. Three of the sections of that act were repealed by the revisory act of the 28th of February, 1793, but the sixth section, with its penal clause, was left in full force. Id., 324. Officers of the navy, seamen and marines, disabled in the line of their duty, were declared to be entitled to pensions for life or during their disability by the act of the 3d of March, 1803, and by the subsequent act of the 10th of April, 1806, the operation of the act was extended to the widows and children of such officers, seamen and marines. 2 id., 376.

Rules and regulations for prosecuting applications to obtain the benefits of the act were prescribed, and the eighth section of the act, like the sixth section of the act of the 23d of March, 1793, prohibits the sale, transfer or mortgage of the whole or any part of the pension before the same becomes due, and requires every person claiming such pension under a power of attorney or substitution to make oath or affirmation, before the same is paid to them, that the power of attorney or substitution is not given by reason of any transfer

of such pension; and the provision is, that if the affiant shall swear or affirm falsely in the premises, and be thereof convicted, he shall suffer as for wilful and corrupt perjury. Regular allowances paid to an individual by government in consideration of services rendered, or in recognition of merit, civil or military, are called pensions. Military pensions are divisible into two classes — invalid and gratuitous, or such as are granted as rewards for eminent services, irrespective of physical disability. Laws of the kind in this country granting invalid pensions were passed by the states during the revolution, and were followed by similar provisions passed by the continental congress. 1 Laws U. S. (Bioren & Duane's ed.), 687-692; 2 id., 73. Many of those provisions were in force when the constitution was adopted, and some of the early laws of the congress under the new constitution were passed to fulfil and make good the obligations which were acknowledged by continental legislation. Such laws had their origin in the patriotic service, great hardships, severe suffering, and physical disabilities contracted while in the public service by the officers, soldiers and seamen who spent their property, lost their health and gave their time for their country in the great struggle for liberty and independence, without adequate or substantial compensation. Power existed in the states before the constitution was adopted, and it would serve to undermine the public regard for our great charter if it could be held that it did not continue the same power in the congress. Even the respondent admits that congress may declare war, raise and support armies, provide and maintain a navy, and make rules for the government and regulation of the land and naval forces; and it is equally clear that congress may make all laws which shall be necessary and proper for carrying the powers granted by the constitution into execution.

§ 488. *It is competent for congress to pass laws securing to pensioners the enjoyment of their pensions, and to protect the fund both before and after it reaches their hands.*

Concede that, and it follows that congress may grant such donations to the officers, soldiers and seamen employed in such public service. Bounties may be offered to promote enlistments, and pensions to the wounded and disabled may be promised as like inducements. Past services may also be compensated, and pensions may also be granted to those who were wounded, disabled or otherwise rendered invalids while in the public service, even in cases where no prior promise was made or antecedent inducement held out. Enactments of the kind, it is conceded, may be valid; and if so, it is difficult to see why congress may not pass laws to protect the fund appropriated for such a beneficiary of the government, certainly until it reaches his hands. Congress in many cases has passed such laws, and provided that the money shall not be transferable or subject to attachment, levy or seizure, even after it has been received by the agent, attorney or guardian.

§ 489. — *analogous cases and provisions.*

Conclusive support to that proposition is found in the fourth section of the act of the 15th of May, 1828, which provides that the pay of the pensioners therein named shall not in any way be transferable or liable to attachment, levy or seizure by any legal process whatever, but shall inure wholly to the personal benefit of the officer or soldier entitled to the same by this act. 4 Stat., 270. Exemptions of certain properties of small value, such as personal apparel and tools of trade, existed in the state laws; but no court ever called the federal exemption in question because it was something in addition to what was contained in the state law, nor because the operation of the act of congress



was extended beyond the time when the money was received by the agent, attorney or guardian of the pensioner. Payment of pensions under the second section of the act passed the next year might be made to the widow of the deceased pensioner or to her attorney, or, if he left no widow or no one then living, to the children of the pensioner or to their guardian or his attorney, and if no child or children, then to the legal representatives of the deceased. *Id.*, 350.

Authority was also given to the secretary of the treasury by the act of the 15th of June, 1832, to pay pensions to the pensioners, or their authorized attorneys, at such places and times as he might direct; but the same section provided that the pay of the pensioner should not be in any way transferable or liable to attachment, levy or seizure by any legal process whatever, and that it should inure wholly to the personal benefit of the individual entitled to the same. *Id.*, 356; 5 *id.*, 128. Certain duties in that regard, previously devolved upon the secretary of the treasury, were, by the resolution of the 28th of June, 1832, transferred to the secretary of war. Five years' half-pay and pensions were granted to certain widows of the officers and soldiers of the Revolution by the act of the 7th of July, 1838; and the second section of the act provided that no pledge, mortgage, sale, assignment or transfer of any right, claim or interest in any annuity, half-pay or pension granted by the act shall be valid, nor shall the half-pay, annuity or pension granted by the act, or any former act of congress, be liable to attachment, levy or seizure by any process in law or equity, and adds, as in the prior acts cited, that it shall inure wholly to the personal benefit of the pensioner or annuitant entitled to the same. *Id.*, 303. Ten years later, additional relief was granted to the widows of officers and soldiers of the Revolution, and the second section of the act contains the same prohibition and regulations as those contained in the prior act. 9 *id.*, 266. Without more, these selections from the almost innumerable list of acts passed granting pensions are sufficient to prove that throughout the whole period since the constitution was adopted it has been the policy of congress to enact such regulations as will secure to the beneficiaries of the pensions granted the exclusive use and benefit of the money appropriated and paid for that purpose. Other legislation of congress may also be referred to confirming that proposition.

§ 490. *Pensioners are wards of the United States, and it is within its province to protect them.*

Pensioners of the kind are, in certain aspects, wards of the United States, and the legislation of congress already reviewed shows that the national legislature has been constant and vigilant in endeavors to protect their interest and secure to them the use of the annuities and pensions granted in their behalf. For the same purpose and to the same end, congress, on the 14th of July, 1862, prescribed the fees to be charged by agents and attorneys for making out and causing to be executed the papers necessary to establish claims for such pensions, bounty or other allowance, and provided that if any agent or attorney in such a case shall demand or receive any greater compensation than the act allows, he shall be deemed guilty of a high misdemeanor, and be punished as therein provided. 12 *id.*, 568. Stated fees were allowed to agents and attorneys by that act; but congress, two years later, passed a supplemental act, which allows to such agents or attorneys a fixed sum instead of fees. By that provision they are allowed \$10 in full for all service in procuring a pension; and the provision is, that if the agent or attorney shall demand or receive any greater compensation for his services, or agree to prosecute any claim for a

pension, bounty or other allowance under the act, on the condition that he shall receive a per centum upon any portion of the amount of such claim, or shall wrongfully take from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, he shall be deemed guilty of the offense there defined, and be punished as therein prescribed. 13 id., 389.

Regulations somewhat different in certain respects are made in the supplementary act of the 8th of July, 1866, and some of those contained in the two preceding acts are repealed; but every one of the provisions of those acts intended to give protection to pensions or bounties to be paid to the pensioner are either left in full force, or are re-enacted in the supplemental act in the same or equivalent words. 14 id., 56. Prior regulations having proved inadequate to effect the intention of the law-makers that the pension should inure solely to the benefit of the pensioner, congress, on the 8th of July, 1870, enacted that hereafter no pension shall be paid to any person other than the pensioner entitled thereto, nor otherwise than according to that act, and that no warrant, power of attorney or other paper executed or purporting to be executed by any pensioner to any attorney, claim-agent, broker or other person shall be recognized by any agent for the payment of pensions, nor shall any pension be paid thereon, subject to two provisos: 1: That payment to persons laboring under legal disabilities may be made to the guardian of such persons in the manner the act provides. 2. That pensions payable in foreign countries may be made according to the provisions of existing laws. Provision is also made by the seventh section of the act that the fee of agents and attorneys for the preparation and prosecution of a claim for pension or bounty land, under any act of congress granting the same, shall not exceed in any case the sum of \$25, and the eighth section makes it a misdemeanor to demand, receive or retain any greater compensation for such services in any particular case. 16 id., 195.

Enough appears in these references to the legislation of the congress under the constitution to show that throughout the entire period since its adoption it has been the unchallenged practice of the legislative department of the government, with the sanction of every president, including the father of the country, to pass laws to prevent the diversion of pension money from inuring solely to the use and benefit of those to whom the pensions are granted. With that view, sales, pledges, mortgages, assignments and every other kind of conveyance have been prohibited. Agents employed to collect the money have been required to make oath that they have no interest in such money by any such pledge, mortgage, transfer, agreement or arrangement, and that they know of none, and provision has several times been made for their punishment if they swear falsely. Most of these regulations have been enacted to prevent agents, attorneys and guardians from withholding the fund or converting the same to their own use before it passes into the hands of the beneficiary; but congress has gone further, and passed laws exempting the money from attachment, execution and seizure by any legal process in law or equity. No question of such exemption is involved in the present case; but if congress may legislate to protect the fund from the grasp of creditors before it reaches the beneficiary, none, it is presumed, will deny the power of congress to legislate to the end to prevent the agent, attorney or guardian from converting the same to his use. Any other argument is hardly necessary to show that the act of congress in question is a valid and constitutional law; but if more be needed, it will be

found in the decisions of the courts, which are numerous and decisive in support of the same proposition.

§ 491. *Pensions exempt from state process.*

State courts in more than one instance have decided that money received as pension from the United States is not liable to attachment, levy or seizure by or under any legal or equitable process whatever. Congress has the power, says Justice Peters, to attach such condition to the grant of the bounty beyond all doubt; and the court held that the language of section 2, in the act of June 6, 1866, was comprehensive enough to exempt such money from any such attachment, levy or seizure under state laws. *Eckert v. McKee*, 9 Bush (Ky.), 355.

§ 492. *Congress may attach any condition to payment of pension.*

It is undoubtedly competent for the United States, said Judge Hoar, to attach such conditions as they may see fit to the grant of a pension, and to fix by law the time and manner in which the property shall finally pass to the pensioner. *Kellogg v. Waite*, 12 Allen (Mass.), 530. But the court in that case held that the rule did not apply to the money after the same had passed into the hands of the pensioner, which is a question that does not arise in this case.

§ 493. *Cases cited.*

Sections 12 and 13 of the Pension Act of July 4, 1864, prescribed the fees of agents employed to collect pensions, and imposed a penalty for receiving a greater fee than that prescribed. Marks was indicted for a violation of that provision, and by the report of the case it appears that he had demanded and received an excess of fees beyond what the act allowed, and he contended that the act was unconstitutional. Hearing was had; and Judge Ballard overruled the defense, holding that the power of congress for the protection of both persons and things was co-extensive with their powers of legislation; that if they grant pensions to meritorious officers, soldiers and seamen, or to their widows, they may by all suitable laws guard and protect the fund thus devoted from being diverted from its object by either the craft or the extortion of unscrupulous agents. *United States v. Marks*, 2 Abb. (U. S.), 534; S. C., 10 Int. Rev. Rec., 42; *United States v. Bennett*, 12 Blatch., 352. Armies may be raised and supported by congress, and under this grant of power, says Judge Withey, congress may enact laws making it an offense punishable in the national courts to detain from a military pensioner any portion of a sum collected in his behalf as his pension. *United States v. Fairchilds*, 1 Abb. (U. S.), 74; S. C., 16 Am. Law Reg., 306. Pensioners were forbidden by the act of July 29, 1848, to pledge the certificate by anticipation to an agent employed to secure the pension; and Slosson, J., held that such a pledge, no matter for what purpose or to whom made, was wholly void, and that an action would lie against such agent, if he refused to deliver it up, for the recovery of the value or the damages resulting from its detention. *Payne v. Woodhull*, 6 Duer (N. Y.), 169.

Moneys due to a debtor from the public authorities, says Daly, J., cannot be reached by a creditor of a pensioner until actually paid over to the debtor. *Nagle v. Slagg*, 15 Abb. Pr., N. S. (N. Y.), 348. Proof of a grant of a pension certificate to the plaintiff, that it is in the possession of the defendants, and that upon a demand made upon the defendants to deliver it to the plaintiff they refused to do so, not only entitles the plaintiff to recover, but makes a case which renders it impossible, in the nature of things, for the defendants to prove any facts which can operate as a bar to the action, or modify in any respect the plaintiff's right to the whole relief sought. *Moffatt v. Van Doren*, 1 Bosw.,

610. An agreement between the widow of a soldier of the Revolution entitled to a pension, and an agent, that the latter was to receive a part of the pension money for his services in obtaining it, says Nash, C. J., is void, and the money received under such an agreement can be recovered back by the pensioner in an action of *assumpsit*. *Powell v. Jennings*, 3 Jones (N. C.), 547. A widow entitled to arrears of pension dying and leaving children, says Woods, J., cannot dispose of such arrears by will, nor can her executor, having received the same, retain it for purposes of administration, but each child is entitled to an equal share, and may recover it of the executor in an action for money had and received. *Fogg v. Perkins*, 19 N. H., 101; *Walton v. Cotton*, 19 How., 357.

§ 494. *The general power of congress to enforce its legislation by suitable penalties.*

It is competent for congress to enforce by suitable penalties all legislation necessary or proper to the execution of power with which it is intrusted, and any act committed with a view of evading such legislation, or fraudulently securing its benefits, may be made an offense against the United States. *United States v. Fox*, 95 U. S., 670. Acts of congress granting such donations to officers, soldiers and seamen, or to their widows or children, in some cases direct that the payment may be made to the attorney or agent of the beneficiary, and in other acts the direction is that the payment may be made to the guardian of the party, and in still another class of such acts the requirement is that the money shall be paid directly to the beneficiary. 4 Stat., 350; 3 id., 569.

§ 495. *The control of congress over pension money does not cease upon its payment.*

For the defendant it is insisted that when the payment is made to the guardian the money paid ceases to be within the constitutional control of the United States, and that the act of congress which enacts that the guardian who embezzles the money, or fraudulently converts the same to his own use, is guilty of a misdemeanor is unconstitutional and void. But the court is unhesitatingly of a different opinion, for several reasons: 1. Because the United States, as the donors of the pensions, may, through the legislative department of the government, annex such conditions to the donation as they see fit, to insure its transmission unimpaired to the beneficiary. 2. Because the guardian, no more than the agent or attorney of the pensioner, is obliged by the laws of congress to receive the fund; but if he does, he must accept it subject to the annexed conditions. 3. Because the word "guardian," as used in the acts of congress, is merely the designation of the person to whom the money granted may be paid for the use and benefit of the pensioners. 4. Because the fund proceeds from the United States, and inasmuch as the donation is a voluntary gift, the congress may pass laws for its protection, certainly until it passes into the hands of the beneficiary, which is all that is necessary to decide in this case. 5. Because the elements of the offense defined by the act of congress in question consist of the wrongful acts of the individual named in the indictment, wholly irrespective of the duties devolved upon him by the state law. 6. Because the theory of the defendant, that the act of congress augments, lessens or makes any change in respect to the duties of a guardian, under the state law, is entirely erroneous, as the act of congress merely provides that the pension may be paid to the person designated as guardian, for the use and benefit of the pensioner, and that the person who receives the pension, if he embezzles it or fraudulently converts it to his own use, shall be guilty of a misdemeanor, and be punished as therein provided.

Viewed in the light of these suggestions, it is clear that congress possessed the power: 1. To define the offense set forth in the indictment, and that the circuit court is vested with the jurisdiction to try the offender and sentence him to the punishment which the act of congress imposed. 2. That the defendant, under the circumstances disclosed in the record, was liable to indictment in the circuit court of the United States. 3. That the act of congress defining the offense set forth in the indictment is a valid and constitutional law, enacted in pursuance of the constitution.

Answers will be certified in conformity with this opinion; that is, the answer to the first question must be in the affirmative, and the answers to the second and third questions in the negative; and it is so ordered.

FOX v. STATE OF OHIO.

(5 Howard, 410-440. 1846.)

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.— This case comes before us on a writ of error to the supreme court of the state of Ohio, by whose judgment was affirmed the judgment of the court of common pleas for the county of Morgan in that state, convicting the plaintiff of passing, with fraudulent intent, a base and counterfeit coin in the similitude of a good and legal silver dollar, and sentencing her for that offense to imprisonment and labor in the state penitentiary for three years. The prosecution against the plaintiff occurred in virtue of a statute of Ohio of March 7, 1835, and the particular clause on which the indictment was founded is in the following language, namely: "That if any person shall counterfeit any of the coins of gold, silver or copper currently passing in this state, or shall alter or put off counterfeit coin or coins, knowing them to be such," etc., "every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be imprisoned in the penitentiary and kept at hard labor not more than fifteen nor less than three years." As has been already stated, the plaintiff was convicted of the offense described in the statute, her sentence was affirmed by the supreme court of the state, and with a view of testing the validity of the sentence, a writ of error to the latter court has been issued.

With the exceptions taken to the formality or technical accuracy of the pleadings pending the prosecution, this court can have nothing to do. The only question with which it can regularly deal in this case is the following, namely: Whether that portion of the statute of Ohio, under which the prosecution against the plaintiff has taken place, and, consequently, whether the conviction and sentence founded on the statute, are consistent with or in contravention of the constitution of the United States, or of any law of the United States enacted in pursuance of the constitution? For the plaintiff it is insisted that the statute of Ohio is repugnant to the fifth and sixth clauses of the eighth section of the first article of the constitution, which invest congress with the power to coin money, regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting the current coin of the United States; contending that these clauses embrace not only what their language directly imports, and all other offenses which may be denominated offenses against the coin itself, such as counterfeiting, scaling or clipping it, or debasing it in any mode, but that they embrace other offenses, such as frauds, cheats or impositions between man and man by intentionally circulating or

putting upon any person a base or simulated coin. On behalf of the state of Ohio, it is insisted that this is not the correct construction to be placed upon the clauses of the constitution in question, either by a natural and philological interpretation of their language, or by any real necessity for the attainment of their objects; and that, if any act of congress should be construed as asserting this meaning in the constitution, and as claiming from it the power contended for, it would not be a law passed in pursuance of the constitution, nor one deriving its authority regularly from that instrument.

§ 496. *A state law punishing the offense of passing counterfeit coins is constitutional. It is within the power of the state to punish a private cheat.*

We think it manifest that the language of the constitution, by its proper signification, is limited to the facts, or to the faculty in congress of coining and of stamping the standard of value upon what the government creates or shall adopt, and of punishing the offense of producing a false representation of what may have been so created or adopted. The imposture of passing a false coin creates, produces or alters nothing; it leaves the legal coin as it was, affects its intrinsic value in nowise whatsoever. The criminality of this act consists in the obtaining, for a false representative of the true coin, that for which the true coin alone is the equivalent. There exists an obvious difference, not only in the description of these offenses, but essentially also in their characters. The former is an offense directly against the government, by which individuals may be affected; the other is a private wrong, by which the government may be remotely, if it will in any degree, be reached. A material distinction has been recognized between the offenses of counterfeiting the coin and of passing base coin by a government which may be deemed sufficiently jealous of its authority; sufficiently rigorous, too, in its penal code. Thus, in England, the counterfeiting of the coin is made high treason, whether it be uttered or not; but those who barely utter false money are neither guilty of treason nor of misprision of treason. 1 Hawkins' Pleas of the Crown, 20. Again, 1 East's Crown Law, 178, if A. counterfeit the gold or silver coin, and, by agreement, before such counterfeiting, B. is to receive and vent the money, he is an aider and abettor to the act itself of counterfeiting, and consequently a principal traitor within the law. But if he had merely vented the money for his own private benefit, knowing it to be false, in fraud of any person, he was only liable to be punished as for a cheat and misdemeanor, etc. These citations from approved English treatises on criminal law are adduced to show, in addition to the obvious meaning of the words of the constitution, what has been the adjudged and established import of the phrase counterfeiting the coin, and to what description of acts that phrase is restricted. It would follow from these views, that if within the power conferred by the clauses of the constitution above quoted can be drawn the power to punish a private cheat effected by means of a base dollar, that power certainly cannot be deduced from either the common sense or the adjudicated meaning of the language used in the constitution, or from any apparent or probable conflict which might arise between the federal and state authorities, operating each upon these distinct characters of offense. If any such conflict can be apprehended, it must be from some remote, and obscure, and scarcely comprehensible possibility, which can never constitute an objection to a just and necessary state power. The punishment of a cheat or a misdemeanor practiced within the state, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties

and functions which would be regular or justifiable. It has been objected, on behalf of the plaintiff in error, that if the states could inflict penalties for the offense of passing base coin, and the federal government should denounce a penalty against the same act, an individual under these separate jurisdictions might be liable to be twice punished for the one and the same crime, and that this would be in violation of the fifth article of the amendments to the constitution, declaring that no person shall be subject for the same offense to be twice put in jeopardy of life or limb.

§ 497. *The prohibitions in the first eleven amendments are restrictions upon the federal power, not upon the states.*

Conceding for the present that congress should undertake, and could rightfully undertake, to punish a cheat perpetrated between citizens of a state because an instrument in effecting that cheat was a counterfeited coin of the United States, the force of the objection sought to be deduced from the position assumed is not perceived; for the position is itself without real foundation. The prohibition alluded to as contained in the amendments to the constitution, as well as others with which it is associated in those articles, were not designed as limits upon the state governments, in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the states, and of their citizens. Such has been the interpretation given to those amendments by this court, in the case of *Barron v. The Mayor and City Council of Baltimore*, 7 Pet., 243; and such, indeed, is the only rational and intelligible interpretation which those amendments can bear, since it is neither probable nor credible that the states should have anxiously insisted to ingraft upon the federal constitution restrictions upon their own authority, restrictions which some of the states regarded as the *sine qua non* of its adoption by them.

§ 498. *Quære: Whether, where an offense is denounced by two sovereign powers, each having the authority to punish it, a conviction by the one would bar a subsequent prosecution by the other.*

It is almost certain, that, in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender, who should have suffered the penalties denounced by the one, would not be subjected a second time to punishment by the other, for acts essentially the same, unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration. The particular offense described in the statute of Ohio, and charged in the indictment against the plaintiff in error, is deemed by this court to be clearly within the rightful power and jurisdiction of the state. So far, then, neither the statute in question, nor the conviction and sentence founded upon it, can be held as violating either the constitution or any law of the United States made in pursuance thereof. The judgment of the supreme court of the state of Ohio, affirming that of the court of common pleas, is therefore, in all things, affirmed.

Dissenting opinion by MR. JUSTICE M'LEAN.

I dissent from the opinion of the court, and, as this is a constitutional question, I will state the reasons of my dissent.

The defendant in the state court was indicted and convicted of passing "a certain piece of false, base, counterfeit coin, forged and counterfeited to the likeness and similitude of the good and legal silver coin, currently passing in the state of Ohio, called a dollar." This is made an offense by the law of Ohio, and punished by imprisonment in the penitentiary, and being kept at hard labor, not more than fifteen, nor less than three years. The defendant was sentenced to imprisonment at hard labor for three years. The act of congress of the 3d of March, 1825 (4 Stats. at Large, 119), punishes the same offense "by a fine not exceeding \$5,000, and by imprisonment and confinement to hard labor not exceeding ten years." The eighth article of the constitution gives power to congress "to coin money, regulate the value thereof, and of foreign coin." Also, "to provide for the punishment of counterfeiting the securities and current coin of the United States."

Jurisdiction is taken in this case on the ground that the law under which the defendant in the state court was sentenced is repugnant to the constitution of the United States and the above cited act of congress.

Objection is made to the sufficiency of the description of the counterfeit coin alleged to have been passed. But I think the indictment, although not technical in this averment, is maintainable. The false coin is alleged to be of the similitude "of the good and legal silver coin, currently passing in the state of Ohio, called a dollar." The words "legal," "currently passing," and "dollar," are significant, and must be held to be the coin made legal and current by act of congress, and that the denomination of a dollar, so connected, is a coin legal and current.

§ 499. *The power to punish for counterfeiting coin is vested in congress.*

The power to "coin money, regulate the value thereof and of foreign coin," vested by the constitution in the federal government, is an exclusive power. It is expressly inhibited to the states. And the power to punish for counterfeiting the coin is also expressly vested in congress. This power is not inhibited to the states in terms, but this may be inferred from the nature of the power. Two governments acting independently of each other cannot exercise the same power for the same object. It would be a contradiction in terms to say, for instance, that the federal government may coin money and regulate its value, and that the same thing may be done by the state governments. Two governments might act on these subjects, if uniformity in the coin and its value were not indispensable. There can be no independent action without a freedom of the will, and in this view how can two governments do the same thing, not a similar thing? The coin must be the same and the value the same; the regulation must be the result of the same discretion, and not of distinct and independent judgments. This power, therefore, cannot be exercised by two governments.

The act of congress of the 3d of March, 1825, "more effectually to provide for the punishment of certain crimes against the United States," etc., provides, by the twenty-sixth section, that "nothing in that act shall be construed to deprive the courts of the individual states of jurisdiction, under the laws of the several states, over offenses made punishable by that act." Offenses are made punishable in that act, committed on the high seas, in navy-yards and other places where the United States have exclusive jurisdiction, and also for counterfeiting the coin of the United States. Now it must be admitted that congress cannot cede any portion of that jurisdiction which the constitution has vested in the federal government. And it is equally obvious that a state cannot pun-



ish offenses committed on the high seas, or in any place beyond its limits. The above section, therefore, cannot extend to offenses without the state, nor to state statutes subsequently enacted. It is a settled rule of construction that the statutes of a state, subsequently enacted, must be expressly adopted by congress. The statute under which the defendant below was indicted was passed the 7th of March, 1835, so that no force could be given to it by the act of congress of 1825.

That congress have power to provide for the punishment of this offense seems to admit of no doubt. Coin is the creation of the federal government, and the power to punish the counterfeiting of this coin is expressly given in the constitution. And these powers must be incomplete, and in a great degree inoperative, unless congress can also exercise the power to punish the passing of counterfeit coin. Such a power has been exercised by the federal government for many years, and its constitutionality has never been questioned. Counterfeiting the notes of the Bank of the United States was made an offense by congress (3 Stats. at Large, 275), and punishments were inflicted under that law. This power was never doubted by any one who believed that congress had power to establish a national bank. It seemed to be the necessary result of the power to establish the bank; for the principal power was in a great degree a nullity, unless congress had power to protect that which they had created. I speak not of the power to establish the bank, but of the power which necessarily resulted from the exercise of that power. And if this power to protect the notes of the bank was necessary, the power to protect the coin is still clearer, as there can be no question as to the constitutionality of the act of congress to establish the coin and punish the act of counterfeiting it. In relation to the bank, the principal power is doubted by many, but in relation to the coinage there can be no doubt. The protection of the coin was at least as necessary as the protection of the notes of the bank. But it cannot be necessary further to illustrate the power of congress to punish the passing of counterfeit coin. It is a power which seems never to have been doubted.

Under the power "to establish postoffices and post-roads," congress have provided for punishing violations of the mail (4 id., 102), regulated the duties of the agents of the postoffice department, required, under heavy penalties, ferry-keepers to pass over the mail without delay, etc. These, and numerous other regulations, are necessary to carry out the principal power. And so in relation to the coins. Is it reasonable to suppose that congress, having power to coin money, and to punish for counterfeiting the coin, should have no power to punish for passing counterfeit coin? Is this coin created by the federal government, and thrown upon the community, without power to prevent a fraudulent use of it? The powers of the general government were not delegated in this manner. Where a principal power is clearly delegated, it includes all powers necessary to give effect to the principal power. This is not controverted, it is believed, by any one. It would seem, therefore, that the power to punish for passing counterfeit coin is clearly in the federal government.

§ 500. *Whether the states may punish acts which are made penal by an act of congress.*

Can this same power be exercised by a state? I think it cannot. Formerly, congress provided that the state courts should have jurisdiction of certain offenses under their laws, and in several states indictments were prosecuted, and to a limited extent the laws of the Union were enforced by the states. But some states very properly refused to exercise the jurisdiction in such cases; and

it was too clear for argument that congress could not impose such duties on state courts. And this doctrine is now universally established. Consequently, no state court will undertake to enforce the criminal law of the Union, except as regards the arrest of persons charged under such law. It is therefore clear that the same power cannot be exercised by a state court as is exercised by the courts of the United States in giving effect to their criminal laws. In some cases the acts of congress adopt the laws of the states on particular subjects; but even these, so far as the United States are concerned, become their laws by adoption, as fully as if they had been originated by them, and cannot be considered in any different light than as if they had been so passed. If a state punish acts which are made penal by an act of congress, the power cannot be derived from the act of congress, but from the laws of the state. And in this light must the act of Ohio be considered, under which the defendant below was punished.

The act of Ohio does not prescribe the same punishment for passing counterfeit coin as the act of congress. This state law must stand upon the power of the state to punish an act over which the law of congress extends and punishes. The passage of counterfeit coin is said to be a fraud which the state may punish. With the same propriety, it is supposed that a state may punish for larceny a person who steals money from the mail or a postoffice. And yet a jurisdiction over this offense, it is believed, has not been exercised by a state. The postmaster or the carrier, as the case may be, has a temporary possession of letters, but the money abstracted from a letter in the mail or in the postoffice may be laid in the owner, who, in contemplation of law, retains the right of property until the money shall be received by the person to whom it is forwarded.

Many, if not all, of the states punish for counterfeiting the coin of the United States, while the same offense is punished by act of congress. And, as before stated, the constitution vests this power expressly in congress. Now, in these two cases, namely, counterfeiting the coin, and passing counterfeit coin, the same act is punished by the federal and state governments. Each government has defined the crime and affixed the punishment, without reference to the action of any other jurisdiction. And the question arises whether, in such cases, where the federal government has an undoubted jurisdiction, a state government can punish the same act. The point is not whether a state may not punish an offense under an act of congress, but whether the state may inflict, by virtue of its own sovereignty, punishment for the same act, as an offense against the state, which the federal government may constitutionally punish. If this be so, it is a great defect in our system; for the punishment under the state law would be no bar to a prosecution under the law of congress. And, to punish the same act by the two governments, would violate not only the common principles of humanity, but would be repugnant to the nature of both governments. If there were a concurrent power in both governments to punish the same act, a conviction under the laws of either could be pleaded in bar to a prosecution by the other. But it is not pretended that the conviction of Malinda Fox, under the state law, is a bar to a prosecution under the law of congress. Each government, in prescribing the punishment, was governed by the nature of the offense, and must be supposed to have acted in reference to its own sovereignty.

There is no principle better established by the common law, none more fully recognized in the federal and state constitutions, than that an individual shall

not be put in jeopardy twice for the same offense. This, it is true, applies to the respective governments; but its spirit applies with equal force against a double punishment, for the same act, by a state and the federal government. Mr. Hamilton, in the thirty-second number of the *Federalist*, says there is an exclusive delegation of power by the states to the federal government in three cases: 1. Where, in express terms, an exclusive authority is granted; 2. Where the power granted is inhibited to the states; and 3. Where the exercise of an authority granted to the Union by a state would be "contradictory and repugnant." The power in congress to punish for counterfeiting the coin, and also for passing it, is exercised under the third head. That a state should punish for doing that which an act of congress punishes is contradictory and repugnant. This is clearly the case whether we regard the nature of the power or the infliction of the punishment. As well might a state punish for treason against the United States as for the offense of passing counterfeit coin. No government could exist without the power to punish rebellion against its sovereignty. Nor can a government protect the coin which it creates unless it has power to punish for counterfeiting or passing it. If it has not power to protect the constitutional currency which it establishes, it is the only exception in the exercise of federal powers.

There can be no greater mistake than to suppose that the federal government, in carrying out any of its supreme functions, is made dependent on the state governments. The federal is a limited government, exercising enumerated powers; but the powers given are supreme and independent. If this were not the case it could not be called a general government. Nothing can be more repugnant or contradictory than two punishments for the same act. It would be a mockery of justice and a reproach to civilization. It would bring our system of government into merited contempt. The sixth article of the constitution preserves the government from so great a reproach. It declares that "this constitution, and the laws of the United States made in pursuance thereof, etc., shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." That the act of congress which punishes the passing of counterfeit coin is constitutional would seem to admit of no doubt. And if that act be constitutional, it is the supreme law of the land; and any state law which is repugnant to it is void. As there cannot, in the nature of things, be two punishments for the same act, it follows that the power to punish being in the general government, it does not exist in the states. Such a power in a state is repugnant in its existence and in its exercise to the federal power. They cannot both stand. I stand alone in this view; but I have the satisfaction to know that the lamented Justice Story, when this case was discussed by the judges the last term that he attended the supreme court, and, if I mistake not, one of the last cases which was discussed by him in consultation, coincided with the views here presented. But at that time, on account of the diversity of opinion among the judges present, and the absence of others, a majority of them being required, by a rule of the court, in constitutional questions, to make a decision, a reargument of the cause was ordered. I think the judgment of the state court should be reversed.

**§ 501. Circulation of counterfeit coin.**—An act of congress punishing the circulation of counterfeit coin is valid and constitutional under the power conferred on congress to coin money, even though no specific authority to make such an enactment is conferred on congress by the constitution. The power given to coin money confers on the United States full

§§ 502-511. CONSTITUTION AND LAWS.—POWERS OF GOVERNMENT.

power to prevent that coin from debasement and depreciation, for the grant of any specific power by the constitution does, by necessary implication and intendment, import the grant of every other power which is essential to the execution of the power thus expressly granted. *Campbell v. United States*,\* 10 Law Rep., 403. See § 481.

§ 502. Whether congress has power to provide for the punishment of the offense of passing counterfeit money, *quære*. *United States v. —*,\* 12 Law Rep., 91.

§ 503. Congress has authority, under its power to coin money, to provide, as it did in section 20 of the act of March 3, 1825, for the punishment of the act of bringing into the United States, from any foreign place, coin counterfeited in the resemblance of the coin of the United States, and also of uttering, publishing and passing such counterfeit coin, with intent to defraud. *United States v. Marigold*,\* 9 How., 560.

§ 504. Regulating charges of pension agents.—The provision of the pension act of 1864 (18 Stats. at Large, 387), which prescribes that an agent or attorney employed to collect a pension shall not charge a fee greater than therein prescribed, under a penalty, is constitutional, and is not an invasion of the right of states to regulate contracts between their citizens, or of the constitutional liberty of the citizens. The power of the United States to grant pensions implies the power to secure to the pensioner the pension granted. When the United States has power over any given subject, they have all the power over that subject which properly belongs to any sovereign government. If the end be legitimate, all the means which are appropriate and adapted to the end are likewise legitimate, and may be applied and used by congress in their discretion. *United States v. Marks*, 2 Abb., 534.

§ 505. Crimes on Indian reservations.—The act of congress providing for the punishment of crimes committed within the limits of an Indian reservation located within the boundaries of a state is unconstitutional and void. It cannot be upheld under the power of congress to regulate commerce with the Indian tribes. Under this clause it seems that the powers of congress are limited to the regulation of commerce with Indian tribes existing as distinct communities, governed by their own laws, and protected by treaty regulations with the United States. *United States v. Bailey*, 1 McL., 235.

§ 506. State courts cannot review decisions of district courts.—State courts have no power to review the decisions of the district courts of the United States in criminal cases, and an attempt to do so by *habeas corpus* is without their jurisdiction and void. *Ableman v. Booth*, 21 How., 514; *United States v. Treasurer of Muscatine Co.*,\* 12 Int. Rev. Rec., 56.

§ 507. Infamous crimes — Indictment.—Under the fifth amendment to the constitution of the United States no crime is infamous unless declared by act of congress to be so, or to be a felony. Each state may, for purposes of its own, designate what shall be considered offenses against its authority, and characterize them as felonies or otherwise, but its legislation in such respects cannot override federal laws, or supply their supposed defects in matters exclusively of federal cognizance. *United States v. Wynn*, 8 McC., 267; *United States v. Burgess*, *id.*, 278.

§ 508. That clause of the fifth amendment to the constitution of the United States which provides that "no person shall be held to answer for a capital or otherwise infamous crime unless upon a presentment or indictment of a grand jury," etc., has left all offenses not capital and infamous to be prosecuted by indictment or information, as the circumstances in each case should seem to require, and as the common law would sanction. It produced no effect on the law or in the practice except, perhaps, as regards a class of misdemeanors regarded as infamous crimes, and which might, before the amendment, be prosecuted by information. The amendment fixed the matter beyond the power of congress, or the courts, to alter the course of proceeding in bringing forward a charge of crime in the class of cases embraced by the provision. *United States v. Shepard*, 1 Abb., 437.

§ 509. Object of the fifth amendment.—The fifth and sixth amendments to the constitution of the United States were adopted to secure to the defendant, in a criminal prosecution, the same mode of trial and the same mode of proceeding that had been previously established and practiced in the courts of the several states. These rules were the rules of the common law, modified as they had been by the laws of the various states down to the time of the enactment of the crimes act by congress in 1790. *United States v. Reid*, 12 How., 364.

§ 510. The fifth and sixth amendments to the constitution do not, in any manner, restrict or apply to the war-making power of the government. *Miller v. United States*, 11 Wall., 268.

§ 511. Speedy trial, etc.—The sixth amendment to the constitution of the United States, which provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," applies only to offenses committed within the limits of a state; and where a crime is committed against the laws of the United States outside the limits of a state, it is not local, but may be

tried at such place as congress shall designate by law. *United States v. Dawson*, 15 How., 487. See CRIMES.

§ 512. Under the sixth amendment to the constitution of the United States, which provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall previously have been ascertained by law," the district must have been ascertained before the commission of the crime and not afterwards. *United States v. Maxon*, 5 Blatch., 361.

§ 513. Under the provision of the constitution, that in all criminal prosecutions the accused shall enjoy the right to a speedy trial by a jury of the state and district wherein the crime shall have been committed, and under the laws of congress, it was held that where the prisoner was arrested in Pennsylvania for treason committed against the United States in Georgia, the court in the former state could not do more than require him to give security to keep the peace and for good behavior. since the courts of the United States in Georgia were closed on account of the rebellion. *United States v. Greiner*,\* 4 Phil., 396; 24 Law Rep., 94.

§ 514. Production of books and papers in revenue cases.—The act of June 22, 1874 (18 Statutes at Large, 186), which gives the federal courts power, on motion of the district attorney, in cases arising under the revenue laws, to procure the production of books and papers relating to transactions alleged to be in fraud of the revenue, is not unconstitutional, under the fifth amendment to the constitution, as compelling persons in criminal prosecutions to be witnesses against themselves. Such proceedings are strictly proceedings *in rem* and are not criminal proceedings. The forfeiture in revenue cases is not, in an apt and legal sense, a punishment for a crime, even though a crime was committed when the forfeiture was incurred. When the judgment of forfeiture necessarily carries with it, as a part of it, a conviction and judgment against the person for the crime, the case is criminal in its character; but when, as in revenue cases, it does not necessarily involve personal conviction and judgment for the offense, and such conviction must be obtained, if at all, by a separate and independent proceeding, the remedy of forfeiture is of a civil and not of a criminal nature. *United States v. Three Tons of Coal*, 6 Biss., 883; *United States v. Distillery No. 28*, 6 Biss., 487; *In re Meador*, 1 Abb., 331.

### III. BILLS OF CREDIT.

SUMMARY.—*Constitutional provision*, § 515.—*Defined*, §§ 516, 518, 519.—*Certificates receivable for taxes*, § 517.—*Notes of bank in which state is exclusive stockholder*, § 520.

§ 515. "No state shall . . . coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; . . ." Const., art. I, sec. 10.

§ 516. The term "bills of credit," as used in the constitution, comprehends the emission of any paper medium by a state government for the purpose of common circulation. *Craig v. State of Missouri*, §§ 521-538.

§ 517. Certificates issued by a state, receivable in payment for taxes, etc., and for the redemption of which the faith and funds of the state are pledged, although not made legal tender, are "bills of credit" within the meaning of the constitutional prohibition. *Ibid.*

§ 518. To constitute a "bill of credit" within the constitution, it must be issued by the state on the faith of the state, and designed to circulate as money in the ordinary business of life. *Briscoe v. Bank of Commonwealth of Kentucky*, §§ 539-558.

§ 519. Bills of credit are paper issued by the sovereign power, containing a pledge of its faith and designed to circulate as money. *Ibid.*

§ 520. Although the Bank of the Commonwealth of Kentucky, in which the state was the exclusive stockholder, was authorized to issue notes as a circulating medium, yet these notes, not being issued upon the faith of the state or by it, the bank alone being liable to suit upon them, were not "bills of credit" within the constitutional inhibition. *Ibid.*

[NOTES.—See §§ 559-563.]

#### • CRAIG v. STATE OF MISSOURI

(4 Peters, 410-465. 1830.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is a writ of error to a judgment rendered in the court of last resort, in the state of Missouri, affirming a judgment obtained by the state in one of its inferior courts, against Hiram Craig and others,

on a promissory note. The judgment is in these words: "And afterwards at a court," etc., "the parties came into court by their attorneys, and, neither party desiring a jury, the cause is submitted to the court; therefore, all and singular the matters and things being seen and heard by the court, it is found by them that the said defendants did assume upon themselves, in manner and form as the plaintiff by her counsel alleged. And the court also find that the consideration for which the writing declared upon and the *assumpsit* was made, was for the loan of loan-office certificates, loaned by the state at her loan office at Chariton, which certificates were issued and the loan made in the manner pointed out by an act of the legislature of the said state of Missouri, approved the 27th day of June, 1821, entitled an act for the establishment of loan offices, and the acts amendatory and supplementary thereto; and the court do further find that the plaintiff has sustained damages by reason of the non-performance of the assumptions and undertakings of them, the said defendants, to the sum of \$237.79, and do assess her damages to that sum. Therefore it is considered," etc.

The first inquiry is into the jurisdiction of the court. The twenty-fifth section of the judicial act declares "that a final judgment or decree in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question" "the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity," "may be re-examined, and reversed or affirmed, in the supreme court of the United States."

To give jurisdiction to this court, it must appear in the record, 1. That the validity of a statute of the state of Missouri was drawn in question, on the ground of its being repugnant to the constitution of the United States. 2. That the decision was in favor of its validity.

1. To determine whether the validity of a statute of the state was drawn in question, it will be proper to inspect the pleadings in the cause as well as the judgment of the court. The declaration is on a promissory note, dated on the 1st day of August, 1822, promising to pay to the state of Missouri, on the 1st day of November, 1822, at the loan office in Chariton, the sum of \$199.99, and the two per cent. per annum, the interest accruing on the certificates borrowed from the 1st of October, 1821. This note is obviously given for certificates loaned under the act "for the establishment of loan offices." That act directs that loans on personal securities shall be made of sums less than \$200. This note is for \$199.99. The act directs that the certificates issued by the state shall carry two per cent. interest from the date, which interest shall be calculated in the amount of the loan. The note promises to repay the sum with the two per cent. interest accruing on the certificates borrowed from the 1st day of October, 1821. It cannot be doubted that the declaration is on a note given in pursuance of the act which has been mentioned.

§ 521. *Under plea of non assumpsit the constitutionality of the law upon which the contract was founded can be drawn in question.*

Neither can it be doubted that the plea of *non assumpsit* allowed the defendants to draw into question at the trial the validity of the consideration on which the note was given. Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue in an action of *assumpsit*. The defendants, therefore, were at liberty to ques-

tion the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. Have they done so?

§ 522. *Trial and finding of facts by the court.*

Had the cause been tried before a jury, the regular course would have been to move the court to instruct the jury that the act of assembly, in pursuance of which the note was given, was repugnant to the constitution of the United States; and to except to the charge of the judges, if in favor of its validity; or a special verdict might have been found by the jury, stating the act of assembly, the execution of the note in payment of certificates loaned in pursuance of that act, and referring its validity to the court. The one course or the other would have shown that the validity of the act of assembly was drawn into question on the ground of its repugnancy to the constitution, and that the decision of the court was in favor of its validity. But the one course or the other would have required both a court and jury. Neither could be pursued where the office of the jury was performed by the court. In such a case, the obvious substitute for an instruction to the jury, or a special verdict, is a statement by the court of the points in controversy, on which its judgment is founded. This may not be the usual mode of proceeding, but it is an obvious mode; and if the court of the state has adopted it, this court cannot give up substance for form. The arguments of counsel cannot be spread on the record. The points urged in argument cannot appear. But the motives stated by the court on the record for its judgment, and which form a part of the judgment itself, must be considered as exhibiting the points to which those arguments were directed, and the judgment as showing the decision of the court upon those points. There was no jury to find the facts and refer the law to the court; but if the court, which was substituted for the jury, has found the facts on which its judgment was rendered, its finding must be equivalent to the finding of a jury. Has the court, then, substituting itself for a jury, placed facts upon the record, which, connected with the pleadings, show that the act, in pursuance of which this note was executed, was drawn into question on the ground of its repugnancy to the constitution?

After finding that the defendants did assume upon themselves, etc., the court proceeds to find "that the consideration for which the writing declared upon and the *assumpsit* was made, was the loan of loan-office certificates loaned by the state at her loan office at Chariton; which certificates were issued and the loan made in the manner pointed out by an act of the legislature of the said state of Missouri, approved the 27th of June, 1821, entitled," etc. Why did not the court stop immediately after the usual finding that the defendants assumed upon themselves? Why proceed to find that the note was given for loan-office certificates issued under the act contended to be unconstitutional and loaned in pursuance of that act, if the matter thus found was irrelevant to the question they were to decide? Suppose the statement made by the court to be contained in the verdict of a jury which concludes with referring to the court the validity of the note thus taken in pursuance of the act, would not such a verdict bring the constitutionality of the act, as well as its construction, directly before the court? We think it would; such a verdict would find that the consideration of the note was loan-office certificates, issued and loaned in the manner prescribed by the act. What could be referred to the court, by such a verdict, but the obligation of the law? It finds that the certificates for which the note was given were issued in pursuance of the act, and that the contract

was made in conformity with it. Admit the obligation of the act, and the verdict is for the plaintiff; deny its obligation, and the verdict is for the defendant. On what ground can its obligation be contested but its repugnancy to the constitution of the United States? No other is suggested. At any rate it is open to that objection. If it be in truth repugnant to the constitution of the United States, that repugnancy might have been urged in the state, and may, consequently be urged in this, court; since it is presented by the facts in the record which were found by the court that tried the cause.

§ 523. *What necessary to give appellate jurisdiction under the judiciary act.*

It is impossible to doubt that, in point of fact, the constitutionality of the act, under which the certificates were issued that formed the consideration of this note, constituted the only real question made by the parties, and the only real question decided by the court. But the record is to be inspected with judicial eyes; and, as it does not state in express terms that this point was made, it has been contended that this court cannot assume the fact that it was made or determined in the tribunal of the state. The record shows distinctly that this point existed, and that no other did exist; the special statement of facts made by the court as exhibiting the foundation of its judgment contains this point and no other. The record shows, clearly that the cause did depend, and must depend, on this point alone. If, in such a case, the mere omission of the court of Missouri to say, in terms, that the act of the legislature was constitutional, withdraws that point from the cause, or must close the judicial eyes of the appellate tribunal upon it, nothing can be more obvious than that the provisions of the constitution and of an act of congress may be always evaded, and may be often, as we think they would be in this case, unintentionally defeated.

But this question has frequently occurred, and has, we think, been frequently decided in this court. *Smith v. State of Maryland*, 6 Cranch, 286; *Martin v. Hunter*, 1 Wheat., 355; *Miller v. Nicholls*, 4 Wheat., 311; *Williams v. Norris*, 12 Wheat., 117; *Willson v. Blackbird Creek Marsh Co.*, 2 Pet., 245 (§§ 1174-76, *infra*), and *Harris v. Dennie*, 3 Pet., 292, in this term, are all, we think, expressly in point. There has been perfect uniformity in the construction given by this court to the twenty-fifth section of the judicial act. That construction is that it is not necessary to state in terms on the record that the constitution or a treaty or law of the United States has been drawn in question, or the validity of a state law, on the ground of its repugnancy to the constitution. It is sufficient if the record shows that the constitution, or a treaty or law of the United States, must have been construed, or that the constitutionality of a state law must have been questioned; and the decision has been in favor of the party claiming under such law. We think, then, that the facts stated on the record presented the question of repugnancy between the constitution of the United States and the act of Missouri to the court for its decision. If it was presented, we are to inquire:

§ 524. — *a decision in favor of one claiming under a state law is a decision in favor of its constitutionality.*

2. Was the decision of the court in favor of its validity? The judgment in favor of the plaintiff is a decision in favor of the validity of the contract, and consequently of the validity of the law by the authority of which the contract was made. The case is, we think, within the twenty-fifth section of the judicial act, and consequently within the jurisdiction of this court.

FURTHER STATEMENT.—This brings us to the great question in the cause: Is the act of the legislature of Missouri repugnant to the constitution of the



United States? The counsel for the plaintiffs in error maintain that it is repugnant to the constitution, because its object is the emission of bills of credit, contrary to the express prohibition contained in the tenth section of the first article. The act under the authority of which the certificates loaned to the plaintiffs in error were issued was passed on the 26th of June, 1821, and is entitled "An act for the establishment of loan offices." The provisions that are material to the present inquiry are comprehended in the third, thirteenth, fifteenth, sixteenth, twenty-third and twenty-fourth sections of the act, which are in these words: Section the third enacts "that the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to issue certificates, signed by the said auditor and treasurer, to the amount of \$200,000, of denominations not exceeding \$10, nor less than fifty cents (to bear such devices as they may deem the most safe), in the following form, to wit: 'This certificate shall be receivable at the treasury, or any of the loan offices of the state of Missouri, in the discharge of taxes, or debts due to the state, for the sum of \$——, with interest for the same, at the rate of two per centum per annum from this date, the —— day of ——, 182—.' "

The thirteenth section declares "that the certificates of the said loan office shall be receivable at the treasury of the state, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due to the state, or to any county or town therein, and the said certificates shall also be received by all officers, civil and military, in the state, in the discharge of salaries and fees of office."

The fifteenth section provides "that the commissioners of the said loan offices shall have power to make loans of the said certificates, to citizens of this state, residing within their respective districts only, and in each district a proportion shall be loaned to the citizens of each county therein, according to the number thereof," etc. Section 16. "That the said commissioners of each of the said offices are further authorized to make loans on personal securities, by them deemed good and sufficient, for sums less than \$200; which securities shall be jointly and severally bound for the payment of the amount so loaned, with interest thereon," etc. Section 23. "That the general assembly shall, as soon as may be, cause the salt springs and lands attached thereto, given by congress to this state, to be leased out; and it shall always be the fundamental condition in such leases, that the lessee or lessees shall receive the certificates hereby required to be issued, in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of the said salt springs, the interest accruing to the state, and all estates purchased by officers of the said several offices, under the provisions of this act, and all the debts now due or hereafter to be due to this state, are hereby pledged and constituted a fund for the redemption of the certificates hereby required to be issued, and the faith of the state is hereby also pledged for the same purpose." Section 24. "That it shall be the duty of the said auditor and treasurer to withdraw annually, from circulation, one-tenth part of the certificates which are hereby required to be issued," etc.

§ 525. *The term "emit bills of credit," as used in the constitution, comprehends the emission of any paper medium, by a state government, for the purpose of common circulation.*

The clause in the constitution which this act is supposed to violate is in these words: "No state shall" "emit bills of credit." What is a bill of credit?

What did the constitution mean to forbid? In its enlarged, and perhaps its literal, sense, the term "bill of credit" may comprehend any instrument by which a state engages to pay money at a future day, thus including a certificate given for money borrowed. But the language of the constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." To "emit bills of credit" conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.

At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our revolution, we were driven to this expedient; and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning, and "bills of credit" signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all, the people declared in their constitution that no state should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a state government, for the purpose of common circulation.

§ 526. *Character of the certificates issued in this case—held to be bills of credit.*

What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates signed by the auditor and treasurer of the state are to be issued by those officers to the amount of \$200,000, of denominations not exceeding \$10 nor less than fifty cents. The paper purports on its face to be receivable at the treasury or at any loan office of the state of Missouri in discharge of taxes or debts due to the state. The law makes them receivable in discharge of all taxes or debts due to the state or any county or town therein; and of all salaries and fees of office to all officers, civil and military, within the state, and for salt sold by the lessees of the public salt-works. It also pledges the faith and funds of the state for their redemption. It seems impossible to doubt the intention of the legislature in passing this act, or to mistake the character of these certificates, or the office they were to perform. The denominations of the bills, from \$10 to fifty cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes and debts to the government and to corporations, and of salaries and fees, would give them currency. They were to be put into circulation, that is, emitted, by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character, and di-

rects the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed "bills of credit" instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the constitution. And can this make any real difference? Is the proposition to be maintained that the constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself.

§ 527. *Bills of credit need not be made a legal tender to come within the prohibition.*

But it is contended that though these certificates should be deemed bills of credit, according to the common acceptance of the term, they are not so in the sense of the constitution because they are not made a legal tender. The constitution itself furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit, not to bills of a particular description. That tribunal must be bold indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the constitution contains a substantive prohibition to the enactment of tender laws. The constitution, therefore, considers the emission of bills of credit and the enactment of tender laws as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one, because it is not also the other, to say that bills of credit may be emitted, if they be not made a tender in payment of debts, is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. We are not at liberty to do this.

The history of paper money has been referred to for the purpose of showing that its great mischief consists in being made a tender, and that, therefore, the general words of the constitution may be restrained to a particular intent. Was it even true that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of a conjectural intent to which we are not conducted by the language of any part of the instrument. But we do not think that the history of our country proves either that being made a tender in payment of debts is an essential quality of bills of credit, or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorize a court to convert a general into a particular prohibition.

§ 528. *Paper money under the colonial governments.*

We learn from Hutchinson's History of Massachusetts, vol. 1, p. 402, that bills of credit were emitted for the first time in that colony in 1690. An army returning unexpectedly from an expedition against Canada, which had proved as disastrous as the plan was magnificent, found the government totally unprepared to meet their claims. Bills of credit were resorted to, for relief from this embarrassment. They do not appear to have been made a tender; but they were not on that account the less bills of credit, nor were they absolutely harmless. The emission, however, not being considerable, and the bills being soon redeemed, the experiment would not have been productive of much mischief,

had it not been followed by repeated emissions to a much larger amount. The subsequent history of Massachusetts abounds with proofs of the evils with which paper money is fraught, whether it be or be not a legal tender. Paper money was also issued in other colonies, both in the north and south; and whether made a tender or not, was productive of evils in proportion to the quantity emitted. In the war which commenced in America in 1755, Virginia issued paper money at several successive sessions, under the appellation of treasury notes. This was made a tender. Emissions were afterwards made in 1769, in 1771, and in 1773. These were not made a tender; but they circulated together, were equally bills of credit, and were productive of the same effects. In 1775 a considerable emission was made for the purposes of the war. The bills were declared to be current, but were not made a tender. In 1776 an additional emission was made, and the bills were declared to be a tender. The bills of 1775 and 1776 circulated together, were equally bills of credit, and were productive of the same consequences. Congress emitted bills of credit to a large amount, and did not, perhaps could not, make them a legal tender. This power resided in the states. In May, 1777, the legislature of Virginia passed an act for the first time making the bills of credit issued under the authority of congress a tender so far as to extinguish interest. It was not until March, 1781, that Virginia passed an act making all the bills of credit which had been emitted by congress, and all which had been emitted by the state, a legal tender in payment of debts. Yet they were, in every sense of the word, bills of credit, previous to that time, and were productive of all the consequences of paper money. We cannot, then, assent to the proposition that the history of our country furnishes any just argument in favor of that restricted construction of the constitution for which the counsel for the defendant in error contends.

§ 529. *A note, the consideration of which is bills of credit, is void.*

The certificates for which this note was given, being in truth "bills of credit," in the sense of the constitution, we are brought to the inquiry: Is the note valid of which they form the consideration? It has been long settled that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the constitution of the United States, which is the supreme law, is against law. Now the constitution forbids a state to "emit bills of credit." The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan offices, but the issuing of them, the putting them into circulation, which is the act of emission; the act that is forbidden by the constitution. The consideration of this note is the emission of bills of credit by the state. The very act which constitutes the consideration is the act of emitting bills of credit in the mode prescribed by the law of Missouri, which act is prohibited by the constitution of the United States. Cases which we cannot distinguish from this, in principle, have been decided in state courts of great respectability, and in this court. In the case of *The Springfield Bank v. Merrick*, 14 Mass., 322, a note was made payable in certain bills, the loaning or negotiating of which was prohibited by statute, inflicting a penalty for its violation. The note was held to be void. Had this note been made in consideration of these bills, instead of being made payable in them, it would not have been less repugnant to the statute, and would consequently have been equally void.

In *Hunt v. Knickerbocker*, 5 Johns., 327, it was decided that an agreement for the sale of tickets in a lottery, not authorized by the legislature of the state, although instituted under the authority of the government of another state, is

contrary to the spirit and policy of the law, and void. The consideration on which the agreement was founded being illegal, the agreement was void. The books, both of Massachusetts and New York, abound with cases to the same effect. They turn upon the question whether the particular case is within the principle, not on the principle itself. It has never been doubted that a note given on a consideration which is prohibited by law is void. Had the issuing or circulation of certificates of this or of any other description been prohibited by a statute of Missouri, could a suit have been sustained in the courts of that state on a note given in consideration of the prohibited certificates? If it could not, are the prohibitions of the constitution to be held less sacred than those of a state law? It had been determined, independently of the acts of congress on that subject, that sailing under the license of an enemy is illegal. *Patton v. Nicholson*, 3 Wheat., 204, was a suit brought in one of the courts of this district on a note given by Nicholson to Patton, both citizens of the United States, for a British license. The United States were then, at war with Great Britain; but the license was procured without any intercourse with the enemy. The judgment of the circuit court was in favor of the defendant, and the plaintiff sued out a writ of error. The counsel for the defendant in error was stopped, the court declaring that the use of a license from the enemy being unlawful, one citizen had no right to purchase from or sell to another such a license, to be used on board an American vessel. The consideration for which the note was given being unlawful, it followed of course that the note was void. A majority of the court feels constrained to say that the consideration on which the note in this case was given is against the highest law of the land, and that the note itself is utterly void. In rendering judgment for the plaintiff, the court for the state of Missouri decided in favor of the validity of a law which is repugnant to the constitution of the United States.

In the argument, we have been reminded by one side of the dignity of a sovereign state, of the humiliation of her submitting herself to this tribunal, of the dangers which may result from inflicting a wound on that dignity; by the other, of the still superior dignity of the people of the United States, who have spoken their will in terms which we cannot misunderstand. To these admonitions we can only answer: that if the exercise of that jurisdiction which has been imposed upon us by the constitution and laws of the United States shall be calculated to bring on those dangers which have been indicated; or if it shall be indispensable to the preservation of the Union, and consequently of the independence and liberty of these states, these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law, and can tread only that path which is marked out by duty.

The judgment of the supreme court of the state of Missouri for the first judicial district is reversed, and the cause remanded, with directions to enter judgment for the defendants.

Dissenting opinion by MR. JUSTICE JOHNSON.

This is a case of a new impression, and intrinsic difficulty, and brings up questions of the most vital importance to the interests of this Union. The declaration is in the ordinary form; and the part of the record of the state court which raises the questions before us is expressed in these words: "At a court, etc., came the parties, etc., and neither party requiring a jury, the cause is submitted to the court; therefore, all and singular, the matters and things, and

evidences, being seen and heard by the court, it is found by them that the said defendants did assume upon themselves in the manner and form as the plaintiffs by their counsel allege; and the court also find that the consideration for which the writing declared upon and the *assumpsit* was made, was for the loan of loan-office certificates, loaned by the state at her loan office at Chariton; which certificates were issued and the loan made in the manner pointed out by an act of the legislature of Missouri, approved, etc. And the court do further find that the plaintiff hath sustained damages by reason of the non-performance of the assumptions and undertakings aforesaid, of them the said defendants, to the sum, etc.; and, therefore, it is considered that the plaintiff recover," etc.

In order to understand the case, it may be proper to premise that the territory now occupied by the state of Missouri, having been subject to the Spanish government, was at the time of its cession governed by the civil law, as modified by the Spanish government; that it so continued, subject to certain modifications introduced by act of congress, until it became a state, when the people incorporated into their institutions as much of the civil law as they thought proper, and hence their courts of justice now partake of a mixed character, perhaps combining all the advantages of the civil and common law forms. By one of the provisions of this law the trial by jury is forced upon no one; is yet open to all; and when not demanded, the court acts the double part of jury and judge. It is obvious, therefore, that the matter certified from the record of the state court before recited is in nature of a special verdict, and the judgment of the court is upon that verdict, and in this light it shall be examined.

§ 530. *This court will take notice of the state laws that the state courts take notice of, without their being set forth at length.*

The purport of the finding is that the vote declared upon was given "for a loan of loan-office certificates, loaned by the state under certain state acts, the caption of which is given." Some doubts were thrown out in the argument, whether we could take notice of the state laws thus found, without being set out at length: but in this there can be no question; whatever laws that court would take notice of, we must of necessity receive and consider, as if fully set out. By the acts of the state designated by the court in their finding, the officers of the treasury department of the state were authorized to create certificates of small denominations, from \$10 down to fifty cents, bearing interest at two per centum per annum, and to loan these certificates to individuals; taking in lieu thereof promissory notes, payable not exceeding one year from the date, with not more than six per cent. interest, and redeemable by instalments not exceeding ten per cent. every six months, giving mortgages of landed property for security.

These certificates were in this form: "This certificate shall be receivable at the treasury, or any of the loan offices of the state of Missouri, in the discharge of taxes or debts due the state, for the sum of \$——, with interest for the same at the rate of two per centum per annum from this date, the —— day of ——, 182—;" which form is set out in and prescribed by the act designated in the finding of the court.

§ 531. *Where the special verdict or the instruction of the court shows that the constitutionality of a state law was questioned, and the decision is in favor of its validity, this court has jurisdiction.*

This writ of error is sued out under the twenty-fifth section of the judiciary act, upon the supposition that the state act is in violation of that provision in

the constitution which prohibits the states from emitting bills of credit; and that the note declared on is void, as having been taken for an illegal consideration, or without consideration. As a preliminary question, it has been argued that the case is not within the provisions of the twenty-fifth section; because it does not appear from anything on the record that this ground of defense was specially set up in the courts of the state. But this we consider no longer an open question; it has repeatedly been decided by this court, that if a special verdict, or the instruction of a court, involves such facts as that the judgment must necessarily affirm the validity of the state law, or invalidity of a right set up under the laws or constitution of the United States, the case is sufficiently brought within the provisions of the twenty-fifth section. The judgment of the court in this case affirms the validity of the contract on which the suit is instituted. And this could not have been affirmed, unless on the assumption that the act on which it had its origin was constitutional.

§ 532. *Even a valuable consideration will not make good an illegal contract.*

In the argument of counsel, the objections to this contract were presented in the form of objections to the consideration. But this was unnecessary to his argument; since even a valuable consideration will not make good a contract in itself illegal. These notes originate directly under the law of Missouri; they are taken in pursuance of its provisions; have their origin in it, and rest for their validity upon it; and if that law be void, must fall with it. Whether, therefore, the bills for which they were given be void or valid, if the law be void, the notes would be so. There are some difficulties on the subject of consideration, for which I would reserve myself until they become unavoidable. But it is not one of those difficulties that, as a guide for the state, the power of the states over the law of contracts will legalize a contract made, under whatever law, or for whatever consideration. That argument makes the act to justify itself, and is a direct recurrence to that exercise of sovereign power which it was the leading principle of the constitution that each should renounce, so far as it was incompatible with the provisions of the constitution; the objects of which were the security of individual right, and the perpetuation of the Union.

The instrument is a dead letter, unless its effect be to invalidate every act done by the states in violation of the constitution of the United States. And as the universal *modus operandi* by free states must be through their legislature, it follows that the laws under which any act is done, importing a violation of the constitution, must be a dead letter. The language of the constitution is, "no state shall emit bills of credit;" and this, if it means anything, must mean that no state shall pass a law which has for its object an emission of bills of credit. It follows that, when the officers of a state undertake to act upon such a law, they act without authority; and that the contracts entered into, direct or incidental to such their illegal proceedings, are mere nullities.

§ 533. *The several states, though prohibited from issuing bills of credit, have the power to borrow money.*

This leads us to the main question: "Was this an emission of bills of credit in the sense of the constitution?" And here the difficulty which presents itself is, to determine whether it was a loan or an emission of paper money; or perhaps, whether it was not an emission of paper money under the disguise of a loan. There cannot be a doubt that this latter view of the subject must always be examined; for that which it is not permitted to do directly cannot be legalized by any change of names or forms. Acts done *in fraudem legis* are acts

in violation of law. The great difficulty, as it is here, must ever be to determine, in each case, whether it be a loan, or an emission of bills of credit. That the states have an unlimited power to effect the one, and are divested of power to do the other, are propositions equally unquestionable; but where to draw the discriminating line is the great difficulty. I fear it is an insuperable difficulty.

§ 534. *By the words "bills of credit," in the constitution, is meant paper money.*

The terms, "bills of credit," are in themselves vague and general, and at the present day almost dismissed from our language. It is then only by resorting to the nomenclature of the day of the constitution that we can hope to get at the idea which the framers of the constitution attached to them. The quotation from Hutchinson's History of Massachusetts, therefore, was a proper one for this purpose; inasmuch as the sense in which a word is used by a distinguished historian, and a man in public life in our own country, not long before the Revolution, furnishes a satisfactory criterion for a definition. It is there used as synonymous with paper money; and we shall find it distinctly used in the same sense by the first congress which met under the present constitution. The whole history and legislation of the time prove that, by bills of credit, the framers of the constitution meant paper money, with reference to that which had been used in the states from the commencement of the century, down to the time when it ceased to pass, before reduced to its innate worthlessness.

It was contended in argument for the defendant in error, that it was essential to the description of bills of credit in the sense of the constitution that they should be made a lawful tender. But his own quotations negative that idea; and the constitution does the same in the general prohibition in the states to make anything but gold or silver a legal tender. If, however, it were otherwise, it would hardly avail him here, since these certificates were, as to their officers' salaries, declared a legal tender. The great end and object of this restriction on the power of the states will furnish the best definition of the terms under consideration. The whole was intended to exclude everything from use, as a circulating medium, except gold and silver; and to give to the United States the exclusive control over the coining and valuing of the metallic medium. That the real dollar may represent property, and not the shadow of it. Now, if a state were to pass a law declaring that this representative of money shall be issued by its officers, this would be a palpable and tangible case; and we could not hesitate to declare such a law, and every contract entered into on the issue of such paper, purporting a promise to return the sum borrowed, to be a mere nullity. But suppose a state enacts a law authorizing her officers to borrow \$100,000, and to give in lieu thereof certificates of \$100 each, expressing an acknowledgment of the debt; it is presumed there could be no objection to this. Then suppose that the next year she authorizes these certificates to be broken up into ten, five and even one dollar bills. Where can be the objection to this? And if, at the institution of the loan, the individual had given for the scrip his note at twelve months, instead of paying the cash, it would be but doing in another form what was here done in Missouri, and what is often done in principle, where the loan is not required to be paid immediately in cash.

Pursuing the scrutiny further, and with a view to bringing it as close home to the present case as possible, a state, having exhausted its treasury, proposes to anticipate its taxes for one, two or three years; its citizens, or others, being willing to aid it, give their notes payable at sixty days, and receive the scrip of



the state, at a premium, for the advance of their credit, which enables the state, by discounting these notes, to realize the cash. There could be no objection to this negotiation; and their scrip being by contract to be receivable in taxes, nothing would be more natural than to break it up into small parcels in order to adapt it to the payment of taxes. And if in this state it should be thrown into circulation by passing into the hands of those who would want it to meet their taxes, I see nothing in this that could amount to a violation of the constitution. Thus far the transaction partakes of the distinctive features of a loan, and yet it cannot be denied that its adaptation to the payment of taxes does give it one characteristic of a circulating medium. And another point of similitude, if not of identity, is the provision for forcing the receipt of it upon those to whom the state had incurred the obligation to pay money.

§ 535. *The certificates for small amounts issued by Missouri, receivable for taxes, bearing interest, etc., are not "bills of credit" within the meaning of the constitutional prohibition.*

The result is that these certificates are of a truly amphibious character; but what then should be the course of this court? My conclusion is, that, as it is a doubtful case, for that reason we are bound to pronounce it innocent. It does, indeed, approach as near to a violation of the constitution as it can well go, without violating its prohibition; but it is in the exercise of an unquestionable right, although in rather a questionable form; and I am bound to believe that it was done in good faith until the contrary shall more clearly appear.

Believing it, then, a candid exercise of the power of borrowing, I feel myself at liberty to go further, and briefly to suggest two points, on which these bills vary from the distinctive features of the paper money of the Revolution. 1. On the face of them they bear an interest, and for that reason vary in value every moment of their existence; this disqualifies them for the uses and purposes of a circulating medium; which the universal consent of mankind declares should be of an uniform and unchanging value, otherwise it must be the subject of exchange and not the medium. 2. All the paper medium of the Revolution consisted of promises to pay. This is a promise to receive, and to receive in payment of debts and taxes due the state. This is not an immaterial distinction; for the objection to a mere paper medium is, that its value depends upon mere national faith. But this certainly has a better dependence; the public debtor who purchases it may tender it in payment; and upon a suit brought to recover against him, the constitution contains another provision to which he may have recourse. As far as the feeble powers of this court extend, he would be secured (if he could ever need security) from a violation of his contracts. This approximates them to bills on a fund, and a fund not to be withdrawn by a law of the state.

Upon the whole, I am of opinion that the judgment of the state court should be affirmed.

Dissenting opinion by MR. JUSTICE THOMPSON.

This case comes up by a writ of error from the state court of Missouri, on a judgment recovered against the plaintiffs in error in the highest court in that state; and the first question that has been made here is, whether this court has jurisdiction of the case, under the twenty-fifth section of the judiciary act of 1789.

If the construction of this twenty-fifth section was now for the first time brought before this court, I should entertain very serious doubts whether this

case came within it. The fair and, as I think, the clear import of that section is, that some one of the cases therein stated did in point of fact arise, and was drawn into question, and did receive the judgment and decision of the state court. It is not enough that such question might have been made. A party may waive the right secured to him under this section. This would not in any manner affect the jurisdiction of the state court, and might, of course, be waived. In the present case, there is no doubt but the facts which appeared before the state court presented a case which might properly fall within this section. The defendants might have insisted that the state law was unconstitutional, and that the certificates issued in pursuance of its provisions were void. And if the court had sustained the act, it would have been one of the cases within the twenty-fifth section. But the court was not bound to call upon the party to raise the objection for the purpose of putting the cause in a situation to be brought here by writ of error. It cannot be doubted but that there might have been an express waiver of this right, and I should think an implied waiver would equally preclude a review of the case by this court, and that such waiver ought to be implied in all cases where it does not appear that, in point of fact, the question was made, and received the judgment of the state court. But to entertain jurisdiction in this case is, perhaps, not going further than this court has already gone, and I do not mean to call in question these decisions, but have barely noticed the question for the purpose of stating the rule by which I think all cases under this section should be tested.

The more important question upon the merits of the case is, whether the constitution of the United States interposes any impediment to the plaintiff's right of recovery in this case. And this question has been presented at the bar under the following points: 1. Whether the certificates issued under the provisions of the law of the state of Missouri are bills of credit within the sense and meaning of the constitution. 2. If so, whether, as they formed the consideration of the note on which the judgment below was recovered, the note was rendered thereby void and irrecoverable.

The first is a very important question, and not free from difficulty, and one upon which I have entertained serious doubts; but looking at it in all its bearings, and considering the consequences to which the rule established by a majority of the court will lead, when carried out to its full extent, I am compelled to dissent from the opinion pronounced in this case. The limitation upon the powers of the state of Missouri, which is supposed to have been transcended, is contained in the tenth section of the first article of the constitution of the United States: "No state shall emit bills of credit." Are the certificates issued under the authority of the Missouri law bills of credit, within this prohibition?

The form of the certificate is prescribed in the third section of the act (act 27th of June, 1821), as follows: "This certificate shall be receivable at the treasury or any of the loan offices of the state of Missouri, in the discharge of taxes or debts due to the state, for the sum of \$——, with interest for the same at two per centum per annum, from this date," etc. And the thirteenth section declares "that the certificates of the said loan office shall be receivable at the treasury of the state, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due, or to become due, to the state, or any county or town therein; and the said certificates shall also be received by all officers, civil and military, in the state, in the discharge of salaries and fees of office." It is proper here to notice that, if the latter

branch of this section should be considered as conflicting with that prohibition in the constitution which declares that no state shall make anything but gold and silver coin a tender in payment of debts, no such question is involved in the case now before the court, and the law may be good in part, although bad in part.

§ 536. *A state has power to borrow money, and to give vouchers therefor.*

The precise meaning and interpretation of the terms bills of credit has nowhere been settled, or, if it has, it has not fallen within my knowledge. As used in the constitution, it certainly cannot be applied to all obligations or vouchers given by, or under the authority of, a state for the payment of money. The right of a state to borrow money cannot be questioned, and this necessarily implies the right of giving some voucher for the repayment; and it would seem to me difficult to maintain the proposition that such voucher cannot legally and constitutionally assume a negotiable character, and as such, to a certain extent, pass as, or become a substitute for, money. The act does not profess to make these certificates a circulating medium or substitute for money. They are (except as relates to public officers) made receivable only for taxes and debts due to the state, and for salt sold by the lessees of salt springs belonging to the state. These are special and limited objects, and these certificates cannot answer the purpose of a circulating medium to any considerable extent.

§ 537. *A simple promise, bond or other security, given by a state as a voucher for money borrowed by it, is not a "bill of credit," within the meaning of the constitutional prohibition.*

A simple promise to pay a sum of money, a bond or other security given for the payment of the same, cannot be considered a bill of credit, within the sense of the constitution. Such a construction would take from the states all power to borrow money, or execute any obligation for the repayment. The natural and literal meaning of the terms imports a bill drawn on credit merely, and not bottomed upon any real or substantial fund for its redemption. There is a material and well known distinction between a bill drawn upon a fund and one drawn upon credit only. A bill of credit may, therefore, be considered a bill drawn and resting merely upon the credit of the drawer, as contradistinguished from a fund constituted or pledged for the payment of the bill. Thus the constitution vests in congress the power to borrow money on the credit of the United States. A bill drawn under such authority would be a bill of credit. And this idea is more fully expressed in the old confederation (art. 9): "Congress shall have power to borrow money or emit bills on the credit of the United States."

§ 538. *The certificates issued by Missouri, in small sums, receivable for taxes, etc., were not "bills of credit," within the meaning of the constitutional prohibition, but were vouchers for money borrowed by the state.*

Can the certificates issued under the Missouri law, according to the fair and reasonable construction of the act, be said to rest on the credit of the state? Although the securities taken for the certificates loaned are not in terms pledged for their redemption, yet these securities constitute a fund amply sufficient for that purpose, and may well be considered a fund provided for that purpose. The certificates are a mere loan upon security in double the amount loaned. And in addition thereto (section 29), provision is made expressly for constituting a fund for the redemption of these certificates. These are guards and checks against their depreciation, by insuring their ultimate redemption.

The emissions of paper money by the states previous to the adoption of the constitution were, properly speaking, bills of credit, not being bottomed upon any fund constituted for their redemption, but resting solely for that purpose upon the credit of the state issuing the same. There was no check, therefore, upon excessive issues, and a great depreciation and loss to holders of such bills followed as matter of course. But when a fund is pledged, or ample provision made, for the redemption of a bill or voucher, whatever it may be called, there is but little danger of a depreciation or loss. But should these certificates be considered bills of credit, under an enlarged sense of such an instrument, it does not necessarily follow that they are bills of credit within the sense and meaning of the constitution. As no precise and technical meaning, or interpretation of a bill of credit has been shown, we may, with propriety, look to the state of things at the adoption of the constitution, to ascertain what was probably the understanding of the convention by this limitation on the power of the states. The state emissions of paper money had been excessive, and productive of great mischief. In some states, and at some times, such emissions were, by law, made a tender in payment of private debts, in others not so. But the great evil that existed was, that creditors were compelled to take such a depreciated currency and articles of property in payment of their debts. This being the mischief, is it an unfair construction of the constitution to restrict the intended remedy to the acknowledged and real mischief? The language of the constitution may, perhaps, be too broad to admit of this restricted application. But to consider the certificates in question bills of credit, within the constitution, is, in my judgment, a construction of that instrument which will lead to serious embarrassment with state legislation, as existing in almost every member of the Union.

If these certificates are bills of credit inhibited by the constitution, it appears to me difficult to escape the conclusion that all bank-notes, issued either by the states, or under their authority and permission, are bills of credit falling within the prohibition. They are certainly, in point of form, as much bills of credit; and if being used as a circulating medium, or substitute for money, makes these certificates bills of credit, bank-notes are more emphatically such. And not only the notes of banks directly under the management and control of a state, of which description of banks there are several in the United States, but all notes of banks established under the authority of a state must fall within the prohibition. For the states cannot certainly do that indirectly which they cannot do directly. And, if they cannot issue bank-notes because they are bills of credit, they cannot authorize others to do it. If this circuitous mode of doing the business would take the case out of the prohibition, it would equally apply to the Missouri certificates, for they were issued by persons acting under the authority of the state, and, indeed, could be issued in no other way. This prohibition in the constitution could not have been intended to take from the states all power whatever over a local circulating medium, and to suppress all paper currency of every description. The power is given to congress to coin money, and the states are prohibited from coining money. But to construe this as embracing a paper circulating medium of every description, and thereby render illegal the issuing of all bank-notes by or under the authority of the states, will not, I presume, be contended for by any one. And I am unable to discover any sound and substantial reason why the prohibition does not reach all such bank-notes, if it extends to the certificates in question.

The conclusion to which I have come on this point renders it unnecessary for me to examine the second question made at the argument. I am of opinion that the judgment of the state court ought to be affirmed.

MR. JUSTICE M'LEAN, dissented.

BRISCOE v. BANK OF THE COMMONWEALTH OF KENTUCKY.

(11 Peters, 257-350. 1837.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This case is brought before this court by a writ of error from the court of appeals of the state of Kentucky, under the twenty-fifth section of the judiciary act of 1789. 1 Stats. at Large, 85.

An action was commenced by the Bank of the Commonwealth of Kentucky, against the plaintiffs in error, in the Mercer circuit court of Kentucky, on a note for \$2,048.37, payable to the president and directors of the bank; and the defendants filed two special pleas, in the first of which over was prayed of the note on which suit was brought, and they say that the plaintiff ought not to have, etc., because the note was given on the renewal of a like note given to the said bank, and they refer to the act establishing the bank, and allege that it never received any part of the capital stock specified in the act; that the bank was authorized to issue bills of credit, on the faith of the state, in violation of the constitution of the United States. That, by various statutes, the notes issued were made receivable in discharge of executions, and if not so received, the collection of the money should be delayed, etc.; and the defendants aver that the note was given to the bank on a loan of its bills, and that the consideration, being illegal, was void. The second plea presents substantially the same facts. To both the pleas a general demurrer was filed, and the court sustained the demurrer, and gave judgment in favor of the bank. This judgment was removed, by appeal, to the court of appeals, which is the highest court of judicature in the state, where the judgment of the circuit court was affirmed, and being brought before this court by writ of error, the question is presented whether the notes issued by the bank are bills of credit, emitted by the state in violation of the constitution of the United States.

This cause is approached under a full sense of its magnitude. Important as have been the great questions brought before this tribunal for investigation and decision, none have exceeded, if they have equaled, the importance of that which arises in this case. The amount of property involved in the principle is very large; but this amount, however great, could not give to the case the deep interest which is connected with its political aspect. There is no principle on which the sensibilities of communities are so easily excited as that which acts upon the currency; none of which states are so jealous as that which is restrictive of the exercise of sovereign powers. These topics are, to some extent, involved in the present case. It does not belong to this court to select the subjects of their deliberations; but they cannot shrink from the performance of any duty imposed by the constitution and laws.

§ 539. *The terms "bills of credit," in their commercial sense, defined.*

The definition of the terms bills of credit, as used in the constitution, is the first requisite in the investigation of this subject, and if this be not impracticable, it will be found a work of no small difficulty. Even in standard works on the exact sciences, the terms used are not always so definite as to express

only the idea intended. In works on philosophy there is, generally, still less precision of language. But in political compacts more is often left for construction than in most other compositions. This results, in a great degree, from the elements employed in the formation of such compacts; certain interests are to be conciliated and protected; the force of local prejudices must be met and overcome, and habits and modes of action the most opposite are to be reconciled. This was peculiarly the case in the formation of the constitution of the United States. And instead of objecting to it, on account of the vagueness of some of its terms, its general excellence, both as it regards its principles and language, should excite our admiration.

The terms bills of credit, in their mercantile sense, comprehend a great variety of evidences of debt which circulate in a commercial country. In the early history of banks, it seems their notes were generally denominated bills of credit; but in modern times they have lost that designation, and are now called either bank-bills or bank-notes. But the inhibition of the constitution applies to bills of credit in a more limited sense. It would be difficult to classify the bills of credit which were issued in the early history of this country. They were all designed to circulate as money, being issued under the laws of the respective colonies; but the forms were various in the different colonies, and often in the same colony. In some cases they were payable with interest; in others without interest. Funds arising from certain sources of taxation were pledged for their redemption, in some instances; in others they were issued without such a pledge. They were sometimes made a legal tender; at others, not. In some instances, a refusal to receive them operated as a discharge of the debt; in others, a postponement of it. They were sometimes payable on demand; at other times, at some future period. At all times the bills were receivable for taxes, and in payment of debts due to the public, except, perhaps, in some instances, where they had become so depreciated as to be of little or no value. These bills were frequently issued by committees, and sometimes by an officer of the government or an individual designated for that purpose.

The bills of credit emitted by the states during the Revolution, and prior to the adoption of the constitution, were not very dissimilar from those which the colonists had been in the practice of issuing. There were some characteristics which were common to all these bills. They were issued by the colony or state, and on its credit. For in cases where funds were pledged, the bills were to be redeemed at a future period, and gradually as the means of redemption should accumulate. In some instances congress guarantied the payment of bills emitted by a state. They were, perhaps, never convertible into gold and silver immediately on their emission; as they were issued to supply the pressing pecuniary wants of the government, their circulating as money was indispensable. The necessity which required their emission precluded the possibility of their immediate redemption.

In the case of *Craig v. State of Missouri*, 4 Pet., 410 (§§ 521-538, *supra*), this court was called upon for the first time to determine what constituted a bill of credit, within the meaning of the constitution. A majority of the judges in that case, in the language of the chief justice, say that "bills of credit signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society." A definition so general as this would certainly embrace every description of paper which circulates as money. Two of the dissenting judges, on that occasion, gave a more definite, though, perhaps, a less accurate, meaning of the terms

bills of credit. By one of them it was said, "A bill of credit may, therefore, be considered a bill drawn and resting merely on the credit of the drawer, as contradistinguished from a fund constituted or pledged for the payment of the bill." And in the opinion of the other, it is said, "to constitute a bill of credit, within the meaning of the constitution, it must be issued by a state, and its circulation, as money, enforced by statutory provisions. It must contain a promise of payment by the state generally, when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the state; not that it will be paid on presentation, but that the state, at some future period, on a time fixed or resting in its own discretion, will provide for the payment."

These definitions cover a large class of the bills of credit issued and circulated as money, but there are classes which they do not embrace; and it is believed that no definition, short of a description of each class, would be entirely free from objection, unless it be in the general terms used by the venerable and lamented chief justice. The definition, then, which does include all classes of bills of credit emitted by the colonies or states, is, a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.

§ 540. *The bank charter.*

Having arrived at this point, the next inquiry in the case is whether the notes of the Bank of the Commonwealth were bills of credit within the meaning of the constitution. The first section of the charter provides that the bank shall be established in the name and behalf of the commonwealth of Kentucky, under the direction of a president and twelve directors, to be chosen by joint ballot of both houses of the general assembly, etc. The second provides that the president and directors of the bank, and their successors in office, shall be a corporation and body politic, in law and in fact, by the name and style of the president and directors of the Bank of the Commonwealth of Kentucky, and shall be capable in law to sue and be sued, to purchase and sell every description of property. In the third section it is declared that the stock of the bank shall be exclusively the property of the commonwealth of Kentucky, and that no individual shall own any part of it. The fourth section authorizes the president and directors to issue notes, etc.; and in the fifth section it is declared that the capital stock shall be \$2,000,000, to be paid as follows: "All moneys hereafter paid into the treasury for the purchase of the vacant land of the commonwealth; all moneys paid into the treasury for the purchase of land warrants; all moneys received for the sale of vacant lands west of the Tennessee river, and so much of the capital stock owned by the state in the Bank of Kentucky;" and as the treasurer of the state received these moneys from time to time, he was required to pay the same into the bank.

The bank was authorized to receive moneys on deposit, to make loans on good personal security, or on mortgages; and by the ninth section, the bank was prohibited from increasing its debts beyond double the amount of its capital. Certain limitations were imposed on loans to individuals, and the accommodations of the bank were to be apportioned among the different counties of the state. The president was required to make a report to each session of the legislature. The notes were to be made payable in gold and silver, and were receivable in payment of taxes and other debts due to the state. All mortgages executed to the bank gave to it a priority. By a supplementary act it was provided that the president and directors might issue \$3,000,000.

In 1821 an act was passed authorizing the treasurer of the state to receive the dividends of the bank. The notes issued by the bank were in the usual form of bank-notes, in which the Bank of the Commonwealth promised to pay to the bearer, on demand, the sum specified on the face of the note. There is no evidence of any part of the capital having been paid into the bank; and as the pleas, to which the demurrers were filed, aver that no part of the capital was paid, the fact averred is admitted on the record. It is to be regretted that any technical point arising on the pleadings should be relied on in this case, which involves principles and interests of such deep importance. Had the bank pleaded over, and stated the amount actually paid into it by the state, under the charter, the ground on which it stands would have been strengthened.

As the notes of the bank were receivable in payment for land, and land warrants, and perhaps constituted no inconsiderable part of the circulation of the state, the natural operation would be for the treasurer to receive the notes of the bank, and pay them over to it as a part of its capital. This would be to the bank equal to a payment in the notes of other banks, as it would lessen the demand against it; leaving to the bank the securities on the original discounts. The notes of this bank, as also the notes of the Bank of Kentucky, by an act of the legislature, were required to be received in discharge of all executions by plaintiffs; and if they failed to indorse on the executions that they would be so received, further proceedings on the judgments were delayed two years. On the part of the plaintiffs in error, it is contended that the provision in the constitution, that "no state shall coin money," "emit bills of credit," or "make anything but gold and silver coin a tender in payment of debts," are three distinct powers which are inhibited to the states, and that if the bills of the Bank of the Commonwealth were substantially made a tender, by an act of the legislature of Kentucky, it must be fatal to the action of the bank in this case.

§ 541. *A state law making the notes of a bank legal tender will not affect the constitutionality of the bank.*

It is unnecessary to consider, on this head, whether the above provision of the act of the legislature, making these notes receivable in discharge of executions, is substantially a tender law; as such a question, however it might rise on the execution, cannot reach the obligation given to the bank. If the legislature of a state attempt to make the notes of any bank a tender, the act will be unconstitutional; but such attempt could not affect, in any degree, the constitutionality of the bank. The act referred to in the present case was not connected with the charter of the bank. So far as this act has a bearing on the bills issued by this bank, and may tend to show their proper character, it may be considered. But the main grounds on which the counsel for the plaintiffs rely is, that the Bank of the Commonwealth, in emitting the bills in question, acted as the agent of the state; and that, consequently, the bills were issued by the state. That as a state is prohibited from issuing bills of credit, it cannot do indirectly what it is prohibited from doing directly. That the constitution intended to place the regulation of the currency under the control of the federal government, and that the act of Kentucky is not only in violation of the spirit of the constitution, but repugnant to its letter. These topics have been ably discussed at the bar, and in a printed argument on behalf of the plaintiffs.

That by the constitution, the currency, so far as it is composed of gold and silver, is placed under the exclusive control of congress, is clear; and it is contended from the inhibition on the states to emit bills of credit, that the paper



medium was intended to be made subject to the same power. If this argument be correct, and the position that a state cannot do indirectly what it is prohibited from doing directly, be a sound one, then it must follow, as a necessary consequence, that all banks incorporated by a state are unconstitutional. And this, in the printed argument, is earnestly maintained, though it is admitted not to be necessary to sustain the ground assumed for the plaintiffs. The counsel of the plaintiffs who have argued the case at the bar do not carry the argument to this extent. This doctrine is startling, as it strikes a fatal blow against the state banks, which have a capital of near \$400,000,000, and which supply almost the entire circulating medium of the country. But let us for a moment examine it dispassionately. The federal government is one of delegated powers. All powers not delegated to it, or inhibited to the states, are reserved to the states or to the people.

§ 542. *Though a state cannot emit bills of credit, it may incorporate banks.*

A state cannot emit bills of credit, or, in other words, it cannot issue that description of paper to answer the purposes of money which was denominated, before the adoption of the constitution, bills of credit. But a state may grant acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty, and there is no limitation in the federal constitution, on its exercise by the states, in respect to the incorporation of banks. At the time the constitution was adopted the Bank of North America and the Massachusetts Bank, and some others, were in operation. It cannot, therefore, be supposed that the notes of these banks were intended to be inhibited by the constitution, or that they were considered as bills of credit, within the meaning of that instrument. In fact, in many of their most distinguishing characteristics, they were essentially different from bills of credit, in any of the various forms in which they were issued. If, then, the powers not delegated to the federal government, nor denied to the states, are retained by the states or the people, and by a fair construction of the terms bills of credit, as used in the constitution, they do not include ordinary bank-notes, does it not follow that the power to incorporate banks to issue these notes may be exercised by a state?

A uniform course of action involving the right to the exercise of an important power by the state governments for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised. But this inquiry, though embraced in the printed argument, does not belong to the case, and is abandoned at the bar. A state cannot do that which the federal constitution declares it shall not do. It cannot coin money. Here is an act inhibited in terms so precise that they cannot be mistaken. They are susceptible of but one construction. And it is certain that a state cannot incorporate any number of individuals and authorize them to coin money. Such an act would be as much a violation of the constitution as if the money were coined by an officer of the state, under its authority. The act being prohibited, cannot be done by a state, either directly or indirectly. And the same rule applies as to the emission of bills of credit by a state. The terms used here are less specific than those which relate to coinage. Whilst no one can mistake the latter, there are great differences of opinion as to the construction of the former. If the terms in each case were equally definite, and were susceptible of but one construction, there could be no more difficulty in applying the rule in the one case than in the other. The weight of the argument is admitted, that a state cannot, by any device that may be adopted, emit bills of

credit. But the question arises, what is a bill of credit within the meaning of the constitution? On the answer of this must depend the constitutionality or unconstitutionality of the act in question? A state can act only through its agents; and it would be absurd to say that any act was not done by a state which was done by its authorized agents.

§ 543. *A bill of credit, within the constitution, must be issued by the state, on the faith of the state, and be designed to circulate as money.*

To constitute a bill of credit within the constitution it must be issued by a state, on the faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state; and is so received and used in the ordinary business of life. The individual or committee who issue the bill must have the power to bind the state; they must act as agents, and, of course, do not incur any personal responsibility, nor impart, as individuals, any credit to the paper. These are the leading characteristics of a bill of credit which a state cannot emit.

§ 544. *Notes of a bank in which the state is the only stockholder are not bills of credit.*

Were the notes of the Bank of the Commonwealth bills of credit issued by the state? The president and directors of the bank were incorporated and vested with all the powers usually given to banking institutions. They were authorized to make loans on personal security and on mortgages of real estate. Provisions were made, and regulations, common to all banks; but there are other parts of the charter which, it is contended, show that the president and directors acted merely as agents of the state. In the preamble of the act it is declared to be "expedient and beneficial to the state, and the citizens thereof, to establish a bank on the funds of the state for the purpose of discounting paper and making loans for longer periods than has been customary, and for the relief of the distresses of the community." The president and directors were elected by the legislature. The capital of the bank belonged to the state, and it received the dividends.

These and other parts of the charter, it is argued, show that the bank was a mere instrument of the state to issue bills; and that if, by such a device, the provision of the constitution may be evaded, it must become a nullity. That there is much plausibility and some force in this argument cannot be denied, and it would be in vain to assert that on this head the case is clear of difficulty. The preamble of the act to incorporate the bank shows the object of its establishment. It was intended to "relieve the distresses of the community;" and the same reason was assigned, it is truly said, for the numerous emissions of paper money during the Revolution, and prior to that period.

To relieve the distresses of the community, or the wants of the government, has been the common reason assigned for the increase of a paper medium, at all times and in all countries. When a measure of relief is determined on, it is never difficult to find plausible reasons for its adoption. And it would seem in regard to this subject, that the present generation has profited but little from the experience of past ages. The notes of this bank, in common with the notes of all other banks in the state, and indeed throughout the Union, with some exceptions, greatly depreciated. This arose from various causes then existing, and which, under similar circumstances, must always produce the same result. The intention of the legislature in establishing the bank, as expressed in the preamble, must be considered in connection with every part of the act,

and the question must be answered, whether the notes of the bank were bills of credit within the inhibition of the constitution.

Were these notes issued by the state? Upon their face they do not purport to be issued by the state, but by the president and directors of the bank. They promise to pay to bearer, on demand, the sums stated. Were they issued on the faith of the state? The notes contain no pledge of the faith of the state in any form. They purport to have been issued on the credit of the funds of the bank, and must have been so received in the community. But these funds, it is said, belonged to the state, and the promise to pay on the face of the notes was made by the president and directors as agents of the state. They do not assume to act as agents, and there is no law which authorizes them to bind the state. As in, perhaps, all bank charters, they had the power to issue a certain amount of notes; but they determined the time and circumstances which should regulate these issues.

When a state emits bills of credit the amount to be issued is fixed by law, as also the fund out of which they are to be paid, if any fund be pledged for their redemption; and they are issued on the credit of the state, which, in some form, appears upon the face of the notes, or by the signature of the person who issues them. As to the funds of the Bank of the Commonwealth, they were, in part only, derived from the state. The capital, it is true, was to be paid by the state; but in making loans the bank was required to take good securities, and these constituted a fund to which the holders of the notes could look for payment, and which could be made legally responsible. In this respect the notes of this bank were essentially different from any class of bills of credit which are believed to have been issued. The notes were not only payable in gold and silver on demand, but there was a fund, and, in all probability, a sufficient fund, to redeem them. This fund was in possession of the bank, and under the control of the president and directors. But whether the fund was adequate to the redemption of the notes issued, or not, is immaterial to the present inquiry. It is enough that the fund existed, independent of the state, and was sufficient to give some degree of credit to the paper of the bank. The question is not whether the Bank of the Commonwealth had a large capital or a small one, or whether its notes were in good credit or bad, but whether they were issued by the state, and on the faith and credit of the state. The notes were received in payment of taxes, and in discharge of all debts to the state; and this, aided by the fund arising from notes discounted, with prudent management, under favorable circumstances, might have sustained, and, it is believed, did sustain, to a considerable extent, the credit of the bank. The notes of this bank which are still in circulation are equal in value, it is said, to specie.

But there is another quality which distinguished these notes from bills of credit. Every holder of them could not only look to the funds of the bank for payment, but he had in his power the means of enforcing it. The bank could be sued; and the records of this court show that while its paper was depreciated, a suit was prosecuted to judgment against it by a depositor, and who obtained from the bank, it is admitted, the full amount of his judgment in specie. What means of enforcing payment from the state had the holder of a bill of credit? It is said by the counsel for the plaintiffs that he could have sued the state. But was a state liable to be sued? In the case of *Chisholm v. Georgia*, in 1792, 2 Dal., 419, it was decided that a state could be sued before this court, and this led to the adoption of the amendment of the consti-

tution on this subject. But the bills of credit which were emitted prior to the constitution are those that show the mischief against which the inhibition was intended to operate. And we must look to that period, as of necessity we have done, for the definition and character of a bill of credit. No sovereign state is liable to be sued without her consent. Under the articles of confederation, a state could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought at any time on bills of credit against a state; and it is certain that no suit could have been maintained on this ground prior to the constitution.

In the year 1769, the colonial legislature of Maryland passed an "act for emitting bills of credit," in which bills to the amount of \$318,000 were authorized to be struck, under the direction of two commissioners, whom the governor should appoint. These persons were to be styled "Commissioners for Emitting Bills of Credit," by that name to have succession, to sue or be sued, in all cases relative to their trust. The commissioners were authorized to make loans on good security, to draw bills of exchange on London, under certain circumstances; and they were authorized to reissue the bills issued by them. In the year 1712, it is stated in Hewitt's History of South Carolina, the legislature of that colony established a public bank, and issued £48,000, in bills of credit, called bank bills. The money was to be lent out at interest on landed or personal security. The bills emitted under these acts are believed to be peculiar, and unlike all other emissions under the colonial governments. But a slight examination of the respective acts will show that the bills authorized by them were emitted on the credit of the colonies, and were essentially different from the notes in question. The holders of these bills could not convert them into specie; they could bring no suit. The Maryland bill was as follows: "This indented bill of six dollars shall entitle the bearer hereof to receive bills of exchange payable in London, or gold and silver at the rate of four shillings and six pence per dollar, for the said bill, according to the directions of an act of the assembly of Maryland, dated at Annapolis; signed by R. Conden and J. Clapham." If the leading properties of the notes of the Bank of the Commonwealth were essentially different from any of the numerous classes of bills of credit issued by the states or colonies; if they were not emitted by the state, nor upon its credit, but on the credit of the funds of the bank; if they were payable in gold and silver on demand, and the holder could sue the bank; and if to constitute a bill of credit it must be issued by a state, and on the credit of the state, and the holder could not, by legal means, compel the payment of the bill,—how can the character of these two descriptions of paper be considered as identical? They were both circulated as money, but in name, in form, and in substance, they differ.

It is insisted that the principles of this case were settled in the suit of *Craig v. State of Missouri*, 4 Pet., 410 (§§ 521-538, *supra*).

In that case the court decided that the following paper, issued under a legislative act of Missouri, was a bill of credit within the meaning of the constitution: "This certificate shall be receivable at the treasury, or any of the loan offices, of the state of Missouri, in the discharge of taxes or debts due to the state, in the sum of ——— dollars, with interest for the same, at the rate of two per cent. per annum, from the date." By the act, certificates in this form, of various amounts, were issued and were receivable in discharge of all taxes or debts due to the state, and in payment of salaries of state officers.

Four of the seven judges considered that these certificates were designed to

circulate as money; that they were issued on the credit of the state; and consequently were repugnant to the constitution. These certificates were loaned on good security, at different loan offices of the state, and were signed by the auditor and treasurer of state. They were receivable in payment of salt, at the public salt works, "and the proceeds of the salt springs, the interest accruing to the state, and all estates purchased by officers under the provisions of the act, and all the debts then due, or which should become due, to the state, were pledged and constituted a fund for the redemption of the certificates;" and the faith of the state was also pledged for the same purpose.

It is only necessary to compare these certificates with the notes issued by the Bank of the Commonwealth, to see that no two things which have any property in common could be more unlike. They both circulated as money, and were receivable on public account, but in every other particular they were essentially different. If, to constitute a bill of credit, either the form or substance of the Missouri certificate is requisite, it is clear that the notes of the Bank of the Commonwealth cannot be called bills of credit. To include both papers under one designation would confound the most important distinctions, not only as to their form and substance, but also as to their origin and effect. There is no principle decided by the court in the case of *Craig v. State of Missouri*, 4 Pet., 410, which at all conflicts with the views here presented. Indeed, the views of the court are sustained and strengthened by contrasting the present case with that one. The state of Kentucky is the exclusive stockholder in the Bank of the Commonwealth; but does this fact change the character of the corporation? Does it make the bank identical with the state? And are the operations of the bank the operations of the state? Is the bank the mere instrument of the sovereignty, to effectuate its designs, and is the state responsible for its acts? The answer to these inquiries will be given in the language of this court, used in former adjudications.

In the case of *The Bank of United States v. Planters' Bank*, 9 Wheat., 904, the chief justice, in giving the opinion of the court, says: "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. Thus, many states of the Union who have an interest in banks are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act." "The government becoming a corporator lays down its sovereignty, so far as respects the transactions of the corporation; and exercises no power or privilege which is not derived from the charter." "The state does not, by becoming a corporator, identify itself with the corporation."

In the case of *The Bank of Commonwealth of Kentucky v. Wistar*, 3 Pet., 431, the question was raised whether a suit could be maintained against the bank, on the ground that it was substantially a suit against the state. The

agents of the defendants deposited a large sum in the bank; and when the deposit was demanded, the bank offered to pay the amount in its own notes, which were at a discount. The notes were refused, and a suit was commenced on the certificate of deposit. A judgment being entered against the bank, in the circuit court of Kentucky, a writ of error was brought to this court. In the court below the defendant pleaded to the jurisdiction, on the ground that the state of Kentucky alone was the proprietor of the stock of the bank; for which reason it was insisted that the suit was virtually against a sovereign state. Mr. Justice Johnson, in giving the opinion of the court, after copying the language used in the case above quoted, says: "If a state did exercise any other power in or over a bank, or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such banks from a direct issue of bills of credit; which violation of the constitution, no doubt, the state here intended to avoid." Can language be more explicit and more appropriate than this, to the points under consideration? This court further say: "The defendants pleaded to the jurisdiction, on the ground that the state of Kentucky was sole proprietor of the stock of the bank, for which reason it was insisted that the suit was virtually against a sovereign state. But the court is of opinion that the question is no longer open here. The case of *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat., 904, was a much stronger case for the defendants than the present; for there the state of Georgia was not only a proprietor, but a corporator. Here, the state is not a corporator; since, by the terms of the act, the president and directors alone constitute the body corporate, the metaphysical person liable to suit."

§ 545. *A state, by becoming a stockholder in a bank, imparts none of its attributes of sovereignty to it, whether it own the whole stock exclusively or only part.*

If the bank acted as the agent of the state under an unconstitutional charter, although the persons engaged might be held liable individually, could they have been held responsible as a corporation? It is true the only question raised by the plea was, whether the bank could be sued, as its stock was owned by the state. But it would be difficult to decide this question without, to some extent, considering the constitutionality of the charter. And, indeed, it appears that this point did not escape the attention of the court; for they say, "if a state imparted any of its sovereign attributes to a bank in which it was a stockholder, it would hardly be possible to distinguish the paper of such a bank from bills of credit;" and this, the court say, "the state in that case intended to avoid."

These extracts cover almost every material point raised in this investigation. They show that a state, when it becomes a stockholder in a bank, imparts none of its attributes of sovereignty to the institution; and that this is equally the case whether it own a whole or a part of the stock of the bank. It is admitted by the counsel for the plaintiffs that a state may become a stockholder in a bank; but they contend that it cannot become the exclusive owner of the stock. They give no rule by which the interest of a state in such an institution shall be graduated, nor at what point the exact limit shall be fixed. May a state own one-fourth, one-half, or three-fourths of the stock? If the proper limit be exceeded, does the charter become unconstitutional; and is its constitutionality restored if the state recede within the limit? The court are as much at a loss to fix the supposed constitutional boundary of this right as the counsel can possibly be. If the state must stop short of owning the entire stock, the precise point may surely be ascertained. It cannot be supposed that so important

a constitutional principle as contended for exists without limitation. If a state may own a part of the stock of a bank, we know of no principle which prevents it from owning the whole. As a stockholder, in the language of this court, above cited, it can exercise no more power in the affairs of the corporation than is expressly given by the incorporating act. It has no more power than any other stockholder to the same extent. This court did not consider that the character of the incorporation was at all affected by the exclusive ownership of the stock by the state. And they say that the case of the Planters' Bank presented stronger ground of defense than the suit against the Bank of the Commonwealth. That in the former the state of Georgia was not only a proprietor, but a corporator; and that in the latter the president and directors constituted the corporate body. And yet in the case of the Planters' Bank the court decided the state could only be considered as an ordinary corporator, both as it regarded its powers and responsibilities.

If these positions be correct, is there not an end to this controversy? If the Bank of the Commonwealth is not the state nor the agent of the state; if it possesses no more power than is given to it in the act of incorporation, and precisely the same as if the stock were owned by private individuals, how can it be contended that the notes of the bank can be called bills of credit in contradistinction from the notes of other banks? If, in becoming an exclusive stockholder in this bank, the state imparts to it none of its attributes of sovereignty; if it holds the stock as any other stockholder would hold it, how can it be said to emit bills of credit? Is it not essential, to constitute a bill of credit within the constitution, that it should be emitted by a state? Under its charter the bank has no power to emit bills which have the impress of the sovereignty, or which contain a pledge of its faith. It is a simple corporation, acting within the sphere of its corporate powers, and can no more transcend them than any other banking institution. The state, as a stockholder, bears the same relation to the bank as any other stockholder. The funds of the bank, and its property of every description, are held responsible for the payment of its debts; and may be reached by legal or equitable process. In this respect it can claim no exemption under the prerogatives of the state.

§ 546. *Act in question held constitutional.*

And if in the course of its operations its notes have depreciated like the notes of other banks, under the pressure of circumstances, still it must stand or fall by its charter. In this its powers are defined, and its rights, and the rights of those who give credit to it, are guaranteed. And even an abuse of its powers, through which its credit has been impaired and the community injured, cannot be considered in this case. We are of the opinion that the act incorporating the Bank of the Commonwealth was a constitutional exercise of power by the state of Kentucky; and, consequently, that the notes issued by the bank are not bills of credit within the meaning of the federal constitution. The judgment of the court of appeals is therefore affirmed, with interest and costs.

Dissenting opinion by MR. JUSTICE STORY.

When this cause was formerly argued before this court, a majority of the judges who then heard it were decidedly of opinion that the act of Kentucky establishing this bank was unconstitutional and void, as amounting to an authority to emit bills of credit, for and on behalf of the state, within the prohibition of the constitution of the United States. In principle, it was thought to be decided by the case of *Craig v. State of Missouri*, 4 Pet., 410 (§§ 521-

538, *supra*). Among that majority was the late Mr. Chief Justice Marshall; a name never to be pronounced without reverence. The cause has been again argued, and precisely upon the same grounds as at the former argument. A majority of my brethren have now pronounced the act of Kentucky to be constitutional. I dissent from that opinion; and retaining the same opinion which I held at the first argument, in common with the chief justice, I shall now proceed to state the reasons on which it is founded. I offer no apology for this apparent exception to the course which I have generally pursued, when I have had the misfortune to differ from my brethren, in maintaining silence; for in truth it is no exception at all; as upon constitutional questions I ever thought it my duty to give a public expression of my opinions, when they differed from that of the court.

§ 547. *Definition of "bills of credit," in Craig v. Missouri, 4 Pet., 410, considered and adopted.*

The first question naturally arising in the case is, what is the true interpretation of the clause of the constitution, that "no state shall emit bills of credit?" In other words, what is a bill of credit, in the sense of the constitution? After the decision of the case of *Craig v. State of Missouri*, 4 Pet., 410, I had not supposed that this was a matter which could be brought into contestation, at least unless the authority of that case was to be overturned, and the court were to be set adrift from its former moorings. The chief justice, in delivering the opinion of the court upon that occasion, in answer to the very inquiry, said: "To emit bills of credit conveys to the mind the idea of issuing paper, intended to circulate through the community for its ordinary purposes as money, which paper is redeemable at a future day. This is the sense in which it has been always understood." Again: "The term has acquired an appropriate meaning; and bills of credit signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society." Again: "If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium by a state government, for the purposes of common circulation." One should suppose that this language was sufficiently exact and definite to remove all possible doubt upon the point; and it has the more weight, because it came from one who was himself an actor in the very times when bills of credit constituted the currency of the whole country, and whose experience justified him in this exposition. But it seems that this definition is not now deemed satisfactory, or to be adhered to; and a new exposition is sought, which, in its predicaments, shall not comprehend the bills in question. The arguments of the learned counsel for the bank, on the present occasion, have, as it appears to me, sought for a definition which shall exclude any perils to their case, rather than a definition founded in the intention and language of the constitution. It appears to me that the true nature and objects of the prohibition, as well as its language, can properly be ascertained only by a reference to history; to the mischiefs existing, and which had existed when the constitution was formed; and to the meaning then attached to the phrase "bills of credit," by the people of the United States.

§ 548. *The terms "bills of credit," as applicable to private individuals or corporations, mean negotiable paper designed to pass as currency.*

If we look into the meaning of the phrase as it is found in the British laws or in our own laws, as applicable to the concerns of private individuals or private corporations, we shall find that there is no mystery about the matter;



and that when bills of credit are spoken of, the words mean negotiable paper, intended to pass as currency or as money, by delivery or indorsement. In this sense, all bank-notes or, as the more common phrase is, bank-bills are bills of credit. They are the bills of the party issuing them on his credit and the credit of his funds, for the purposes of circulation as currency or money. Thus, for example, as we all know, bank-notes payable to the bearer (or when payable to order, indorsed in blank) pass in the ordinary intercourse and business of life as money, and circulate and are treated as money. They are not, indeed, in a legal and exact sense, money; but, for common purposes, they possess the attributes and perform the functions of money. Lord Mansfield, in *Miller v. Race*, 1 Burr., 457, speaking on the subject of bank-notes, observed "that these notes are not, like bills of exchange, mere securities or documents for debts, and are not so esteemed; but are treated as money, in the ordinary course and transactions of credit and of business, by the general consent of mankind; and on payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes." And, indeed, so much are they treated as money, that they pass by a will which bequeaths the testator's cash, or money, or property.

In confirmation of what has been already stated, it may be remarked that in the charter of the Bank of England, in 5th and 6th William & Mary, c. 20, sec. 28, an express provision is made, by which the bill or bills obligatory and of credit of the bank are declared to be assignable and negotiable. Similar expressions are to be found in the many acts of the American states incorporating banks, as has been abundantly shown in the citations at the bar. See the acts establishing the Bank of New York, 1791; the Bank of Albany in New York; the Bank of Pennsylvania, 1793; the Bank of New Jersey, 1823; the Bank of Baltimore, 1795; the Bank of Virginia; the State Bank of North Carolina, 1810; the Bank of Georgia; the Bank of Kentucky, etc., etc. The reason is obvious why they are called bills of credit; they are intended to pass as currency or money, and they are issued on the credit of the bank or of other persons who are bound by them. Not but that there is a capital fund of stock for their redemption, for, in general, all banks have such a fund, but that the credit is still given to the corporation, and not exclusively to any particular fund. Indeed, in many cases (as in Massachusetts), the private funds and credit of the corporators are by law, to a limited extent, made responsible for the notes of banks. Such, then, being the true and ordinary meaning applied to bills of credit issued by banks and other corporations, that they are negotiable paper designed to pass as currency, and issued on the credit of the corporation, there is no mystery in the application of the same terms to the transactions of states. The nature of the thing is not changed, the object of the thing is not changed, whether the negotiable paper is issued by a corporation or by a state. *Mutato nomine, de te fabula narratur.*

§ 549. *A bill of credit issued by a state is negotiable paper, designed to pass as currency and circulate as money, and whether it is such is to be tested by the intent of its issuance, and not by the names or forms used.*

A bill of credit, then, issued by a state, is negotiable paper, designed to pass as currency and to circulate as money. It is distinguishable from the evidences of debt issued by a state for money borrowed or debts otherwise incurred, not merely in form but in substance. The form of the instrument is wholly immaterial. It is the substance we are to look to; the question is, whether it is issued and is negotiable and is designed to circulate as currency.

If that is its intent, manifested either on the face of the bill or on the face of the act, and it is in reality the paper issue of a state, it is within the prohibition of the constitution. If no such intent exists, then it is a constitutional exercise of power by the state. This is the test—the sure, and, in my judgment, the only sincere test—by which we can ascertain whether the paper be within or without the prohibition of the constitution. All other tests which have hitherto been applied, and all other tests which can be applied, will be illusory and mere exercises of human ingenuity to vary the prohibition and evade its force. Surely it will not be pretended that the constitution intended to prohibit names and not things, to hold up the solemn mockery of warring with shadows and suffering realities to escape its grasp? To suffer states, on their own credit, to issue floods of paper money as currency, and if they do not call them bills of credit, if they do not give them the very form and impress of a promise by the state or in behalf of the state, in the very form so current and so disastrous in former times, then they are not within the prohibition? Let the impressive language of Mr. Chief Justice Marshall on this very point, in the case of *Craig v. State of Missouri*, 4 Pet., 410,—a voice now speaking from the dead,—let it convey its own admonition and answer to the argument. “And can this (said he) make any real difference? Is the proposition to be maintained that the constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the constitution, in one of the most important provisions, may be openly evaded, by giving a new name to an old thing? We cannot think so.”

But the argument need not be rested here. The question here is, not what is meant by bills of credit, in a mere theoretical sense. But I trust that I shall abundantly show that the definition which was given in the case of *Craig v. State of Missouri*, and the definition which I maintain is the true one; stripped of all mystery, and all extraneous ingredients, is the true one; confirmed by the whole history of the country; and that the true meaning of bill of credit was just as well known and understood from the past and the passing events at the time of the adoption of the constitution, as the terms *habeas corpus*, trial by jury, process of impeachment, bill of attainder, or any other phrase to be found in the technical vocabulary of the constitution. And I mean to insist that the history of the colonies, before and during the Revolution, and down to the very time of the adoption of the constitution, constitutes the highest and most authentic evidence to which we can resort to interpret this clause of the instrument; and to disregard it, would be to blind ourselves to the practical mischiefs which it was meant to suppress, and to forget all the great purposes to which it was to be applied. I trust that I shall be able further to show, from this very history, that any other definition of bills of credit than that given by the supreme court in the case of *Craig v. State of Missouri* is in opposition to the general tenor of that history, as well as to the manifest intention of the framers of the constitution.

Before I proceed further, let me quote a single passage from the *Federalist*, No. 44, in which the writer, in terms of strong denunciation and indignation, exposes the ruinous effects of the paper money of the Revolution (universally in those days called by the name of bills of credit, for there was no attempt to disguise their character), and then adds, “in addition to these persuasive considerations, it may be observed that the same reasons which show the necessity

of denying to the states the power of regulating coin, prove, with equal force, that they ought not to be at liberty to substitute a paper medium instead of coin." This passage shows the clear sense of the writer that the prohibition was aimed at a paper medium, which was intended to circulate as currency, and to that alone.

But it has been said that bills of credit, in the sense of the constitution, are those only which are made by the act creating them a tender in payment of debts. To this argument, it might be sufficient to quote the answer of the chief justice, in delivering the opinion of the court in the case of *Craig v. State of Missouri*, 4 Pet., 410. "The constitution itself" (said he) "furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit; not to bills of credit of a particular description. That tribunal must be bold, indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the constitution contains a substantial prohibition to the enactment of tender laws. The constitution, therefore, considers the emission of bills of credit and the enactment of tender laws as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one because it is not also the other; to say that bills of credit may be emitted if they be not a tender of debts, is, in effect, to expunge that distinct, independent prohibition, and to read the clause as if it had been entirely omitted. We are not at liberty to do this." But, independently of that reasoning, the history of our country proves that it is not of the essence of bills of credit, it is not a part of their definition, that they should be a tender in payment of debts. Many instances, in proof of this, were given in the opinion so often alluded to. Not a single historian upon this subject alludes to any such ingredient as essential or indispensable.

§ 550. *Bills of credit issued by the several colonies, considered.*

It has been said (and it has never been denied) that the very first issue of bills of credit by any of the colonies was by the province of Massachusetts, in 1690. The form of these bills was: "This indented bill of ten shillings, due from the Massachusetts colony to the possessor, shall be in value equal to money, and shall be accordingly accepted by the treasurer, and receivers subordinate to him, in all public payments, and for any stock at any time in the treasury." Then followed the date and the signatures of the committee authorized to emit them. See 3 Story's Comment. on the Constitution, 231, note [2]. They were not made a tender in payment of debts, except of those due to the state. In 1702, 3 Anne, c. 1, another emission of bills of credit for £15,000 was authorized in the same form, but they were not made a tender by the act; and the then duties of impost and excise were directed to be applied to the discharge of those bills, as also a tax of £10,000 on polls and estates, real and personal, to be levied and collected, and paid into the treasury, in 1705. A subsequent act, passed in 1712, made them a tender in payment of private debts. In 1716, art. of 3 Geo. I., c. 6, a further emission of £150,000 in "bills of credit" was expressly authorized to be made in the like form, to be distributed among the different counties of the province in a certain proportion stated in the act; and to be put into the hands of five trustees in each county, to be appointed by the legislature, to be let out by the trustees on real security in the county, in certain specified sums, for the space of ten years, at five per cent. per annum. The mortgages were to be made to the trustees and to be sued for by them; and the profits were to be applied to the general support of the gov-

ernment. These bills were not made a tender. Now, this act is most important to show that the fact that the bills of credit were to be let out on mortgage was not deemed in the slightest degree material to the essence of such bills. An act for the emission of bills of credit, not materially different in the substance of its provisions, had been passed in 1714. 1 Geo. I., c. 2. Another act for the emission of £50,000, in bills of credit, was passed in 1720 (7 Geo. I., c. 9), containing provisions nearly similar, except that the trustees were to be appointed by the towns, and the profits were to be received by the towns, and a tax of £50,000 on polls and estates was authorized to be raised to redeem the same. In 1720 the colony of Rhode Island issued bills of credit, nearly in the form of the Massachusetts bills, and they were made a tender in payment of all debts, excepting special ones; and similar bills were issued in 1710 and 1711. In 1715 another issue was authorized, to be let out by trustees and committees of towns on mortgage for ten years. There is no clause in the act declaring them a tender. The same year another emission was authorized.

In 1709 the colony of Connecticut authorized an emission of bills of credit in a similar form, appropriating a tax for their redemption. There was no clause making them a tender. Numerous other acts of the like nature were passed between that period and 1731, some of which made them a tender and others not. In 1709 the colony of New York issued bills of credit in a form substantially the same; and they were made a tender in the payment of debts, and these bills were to bear interest. Many other emissions of bills of credit were from time to time authorized to be made in similar forms; they were generally made a tender, and generally funds were provided for their due redemption. In 1722 the province of Pennsylvania issued bills of credit in a form not substantially different from those of the New England states, which were delivered to trustees to be loaned on mortgages, on lands or ground-rents; and they were made a tender in payment of all debts. Other emissions, for like purposes, were authorized by subsequent laws. In the year 1739 an emission of bills of credit was authorized by the state of Delaware for similar purposes, and in a similar form, to be loaned on mortgages. They were made a tender in payment of debts, and a sinking fund was provided.

In 1733 Maryland authorized an emission of bills of credit to the amount of £90,000, to be issued by and under the management of three commissioners or trustees, who were incorporated by the name of "The Commissioners or Trustees for emitting Bills of Credit;" and by that name might sue and be sued, and sell all real and personal estate granted them in mortgage, etc. These bills of credit, with certain exceptions, were to be lent out, on interest, by the commissioners or trustees, at four per cent., upon mortgage or personal security; and a sinking fund was provided for their redemption, etc., and they were made a tender in payment of debts. Another emission was authorized in 1769, and two commissioners were appointed to emit the bills, to be called "Commissioners for emitting Bills of Credit;" and by that name to have succession, and to sue and be sued. These bills, also, were to be let out by the commissioners on security, and a fund was provided for their redemption. These bills were not made a tender. (a)

In Virginia bills of credit were issued as early as 1755 under the name of

(a) I have been favored with a sight of one of the original bills issued under the act of Maryland of 1769. It is as follows: "This indented bill of six dollars shall entitle the bearer hereof to receive bills of exchange, payable in London, or gold and silver, at the rate of four shillings and six pence sterling, per dollar, for the said bill; according to the direction of an act of assembly of Maryland, dated at Annapolis, this 4th day of March, A. D. 1770. B. Conden, J. C. Clapham." These gentlemen were, doubtless, the commissioners appointed under the act.

treasury notes, which bore interest and were made a tender in payment of debts. Emissions were subsequently made at other periods, and especially in 1769, 1771 and 1773. These last three were not made a tender. In 1778 another emission of them was authorized, which were made a tender, and a fund was pledged for their redemption. Many other issues were subsequently made which were a tender. What demonstrates that these treasury notes were deemed bills of credit is the fact that by an act passed in 1777, c. 34, it was made penal for any person to "issue or offer in payment any bill of credit, or note, for any sum of money payable to the bearer;" and that the act of 1779, c. 24, makes it a felony for any person to steal any bill of credit, or treasury note, or "loan-office certificate of the United States, or any of them;" and that the act of 1780, c. 19, after reciting that the exigencies of the war requires the emission of paper money, etc., authorizes the emission of new treasury notes, and proceeds to punish with death any person who shall forge "any bill of credit or treasury note, to be issued by virtue of this act." In 1748 North Carolina authorized the emission of bills of credit, which were made a tender, and a fund was provided for their redemption, and many subsequent emissions were authorized, with similar provisions.

In 1703 South Carolina first issued bills of credit. They were to bear an interest of twelve per cent. Funds were provided for their redemption. They do not seem originally to have been made a tender. Many other acts for the emission of bills of credit were, from time to time, passed by the colony; some, if not all, of which were made a tender. One of these acts, passed in 1712, was of a peculiar nature; but as I have not been able to procure a copy of it, I can only refer to it as it is stated by Hewitt (1 Hewitt, Hist. of S. Car., 204), who says: "At this time the legislature thought proper to establish a public bank, and issued £48,000 in bills of credit, called bank-bills, for answering the exigencies of government, and for the convenience of domestic commerce. This money was to be lent out at interest on landed or personal security, and, according to the tenor of the act for issuing the same, it was to be sunk gradually by £4,000 a year, which sum was ordered to be paid annually by the borrowers into the hands of the commissioners appointed for that purpose." In 1760 Georgia authorized an emission of bills of credit to be let out at interest, and mortgages were to be taken by the commissioners. These bills were made a tender. Subsequent acts for issuing bills of credit were passed, but it is not necessary to recite them.

§ 551. *Bills of credit issued by the federal congress considered.*

Congress, during the revolutionary war, issued more than three hundred millions of bills of credit. The first issue was in 1775, and the confederated colonies were pledged for their redemption. None of the bills of credit issued by congress were made a tender, probably from the doubt whether congress possessed the power to make them a tender. The form of those first issued was as follows: "This bill entitles the bearer to receive — Spanish milled dollars, or the value thereof, in gold and silver, according to the resolutions of congress." The last emission was made in 1780, under the guaranty of congress, and was in the following form: "The possessor of this bill shall be paid — Spanish milled dollars by the 31st of December, 1786, with interest, in like money, at the rate of five per cent. per annum, by the state of —, according to an act of the legislature of the state of —, the — day of —, 1780." The indorsement by congress was: "The United States insure the payment of the within bill, and will draw bills of exchange annually, if

demanding according to a resolve of congress of the 18th of March, 1780." These bills were expressly required by congress to issue on the funds of the individual states established for that purpose, and the faith of the United States was pledged for their payment. They were made receivable in all public payments.

I will close this unavoidably prolix, though, in my judgment, very important, review of the history of bills of credit in the colonies, and during the Revolution, with a reference to the act of 24th of Geo. II., c. 53, 1751, for regulating and restraining the issues of paper money in New England. That act, in its prohibitory clause, expressly forbids the issue of "any paper bills or bills of credit of any kind or denomination whatsoever," except for certain purposes, and upon certain specified emergencies, and constantly speaks of "paper bills or bills of credit," as equivalent expressions; thus demonstrating that the true meaning of bills of credit was paper emitted by the state, and intended to pass as currency; or, in other words, as paper money. It further requires that the acts authorizing such issues of "paper bills or bills of credit" shall provide funds for the payment thereof, and makes provisions for cases where such "paper bills or bills of credit" had been loaned out on security, and declares that "no paper currency or bills of credit," issued under the act, shall be a legal tender in payment of any private debts or contracts whatsoever.

§ 552. *Bills of credit need not be a legal tender.*

This historical review furnishes a complete answer to every argument which has been used on the present or on former occasions, which made the nature of bills of credit depend upon any other quality than the simple one of being for money and negotiable, and designed to pass as paper money or paper currency. When it is said that it is of the essence of "bills of credit" that they should be a legal tender, we find that many of them never were a tender. Nay, that the enormous issues by the revolutionary congress were altogether stripped of this quality. When it is said that, to constitute bills of credit, their circulation as money must be enforced by statutable provisions, we find that, in many cases, from the very nature and character of the acts, no such compulsory circulation was contemplated. They did not in their form, generally, contain any express promise on the part of the state to pay them, whether funds were provided or not; and the same form was used in both cases. There was, indeed, in my judgment, in every case, an implied obligation and promise of the state to pay them, whether funds were provided or not. When it is said that it is not a bill of credit unless credit is given to the state on its own express promise to pay, and not when the paper is only declared to be receivable in payment of debts due to the state; that there must be a promise to pay, and not merely a promise to receive,—we find that the very first issues of bills of credit were of this very character, and contained no promise, and yet the colonial legislatures appropriated to them the very name as their true designation.

§ 553. *Express promise to pay on demand or on a future day, not necessary to constitute a bill of credit.*

When it is said that a bill which is payable on demand is not a bill of credit, nor a bill which contains no promise to pay at a future day, we find that on their face nearly all the colonial issues were without any limitation of time, and were receivable in payments to the state immediately upon their presentation, though funds for their redemption were not provided except *in futuro*. The issues by congress were, with a single exception, without any limitation of time

as to payment, and were to be paid in gold or silver. The emission of 1780, already stated, was to be paid at a future time. But congress made no express promise to pay any of their other issues; they simply pledged the colonies for their redemption, and yet congress called them bills of credit. When it is said that bills of credit cannot bear interest, for that disqualifies them for a paper currency, we find that in point of fact such bills were issued both by the colonies and by the revolutionary congress, and indeed, since, by the United States, in the form of treasury notes. When it is said that bills of credit are such only as are issued upon the mere credit of the state, and not bottomed upon any real or substantial fund for their redemption, we find that, in most cases, the colonial bills of credit were issued upon such funds, provided by the very terms of the acts. The statute of 24 Geo. II., c. 53, also in terms applies the very phrase, not only to bills resting on the mere credit of the state, but also to bills having suitable funds provided for their redemption. It goes further, and prohibits the colonies in future from issuing such bills without providing suitable funds. In short, the history of bills of credit in the colonies conclusively establishes that none of these ingenious suggestions, and distinctions, and definitions, were or could have been in the minds of the framers of the constitution. They acted upon known facts, and not theories; and meant, by prohibiting the states from emitting bills of credit, to prohibit any issue in any form, to pass as paper currency or paper money, whose basis was the credit, or funds, or debts, or promises of the states. They looked to the mischief intended to be guarded against in the future, by the light and experience of the past. They knew that the paper money issued by the states had constantly depreciated, whether funds for its redemption were provided or not; whether there was a promise to pay or a promise to receive; whether they were payable with or without interest; whether they were nominally payable *in presenti* or *in futuro*. They knew that whatever paper currency is not directly and immediately, at the mere will of the holder, redeemable in gold and silver, is, and forever must be, liable to constant depreciation. We know the same facts as well as they. We know that the treasury notes of the United States, during the late war, depreciated fifty per cent.; that during the period of the suspension of specie payments by our private banks, at the same period, though with capitals supposed to be ample, their bank-bills sunk from fifteen to twenty-five per cent. below their nominal value. The bills of this very Bank of the Commonwealth of Kentucky, of whose solid and extensive capital we have heard so much, were admitted at the argument to have sunk fifty per cent. from their nominal value. The framers of the constitution could not, without irreverence (not to use a stronger phrase), be presumed to prohibit names and not things; to aim a blow at the artificial forms in which paper currency might be clothed, and leave the substance of the mischief untouched and unredressed; to leave the states at liberty to issue a flood of paper money with which to inundate the community, upon their own sole credit, funds and responsibility, so always that they did not use certain prescribed forms of expression. If the states were to possess these attributes in ample sovereignty, it was worse than useless to place such a prohibition in the front of the constitution. It was holding out a solemn delusion and mockery to the people, by keeping the faith of the constitution to the ear, and breaking it to the sense. My judgment is, that any such interpretation of the constitution would be as unsound as it would be mischievous. The interpretation for which I contend is precisely that which was maintained by this court in the case of *Craig v. State of Missouri*, 4 Pet., 410, where

all these ingenious suggestions, distinctions and definitions, to which I have alluded, were directly overruled. I might, indeed, have spared myself some labor in these researches, if I had not considered that case as in some measure assailed in the present decision, if indeed, it is not shaken to its very foundation.

§ 554. *A state cannot do indirectly what the constitution prohibits it from doing directly.*

The next question in the case is, whether the act of Kentucky establishing this bank is unconstitutional, by authorizing an emission of bills of credit in the shape of the bank-bills or notes of that bank, within the prohibition of the constitution. The argument is, that the state cannot do that indirectly which it cannot consistently with the constitution do directly; and that the bank corporation is here the sole and exclusive instrument of the state, managing its exclusive funds for its exclusive benefit, and under its exclusive management. Even this obvious principle, that the state cannot be permitted indirectly to do what it is directly prohibited to do by the constitution, has been denied, on the present occasion, upon what grounds of reasoning, I profess myself incapable of comprehending. That a state may rightfully evade the prohibitions of the constitution, by acting through the instrumentality of agents in the evasion, instead of acting in its own direct name, and thus escape from all its constitutional obligations, is a doctrine to which I can never subscribe, and which, for the honor of the country, for the good faith and integrity of the states, for the cause of sound morals, and of political and civil liberty, I hope may never be established. I find no warrant for any such doctrine in the case of *Craig v. The State of Missouri*, either in the opinion of the court or in that of the dissentient judges.

The other part of the argument, from which the conclusion is drawn that the act is unconstitutional, requires a more extended consideration. But before proceeding to that, it is proper to notice the statement at the bar that the point of the constitutionality of this act has been already decided by this court. If so, I bow to its authority. I am not disposed to shake, even if I could, the solemn decisions of this court upon any great principles of law; and, *a fortiori*, not that which respects the interpretation of the constitution itself. But I shall require proof before I yield my assent that the point has been so decided. The case relied on is *Bank of Commonwealth of Kentucky v. Wister*, 2 Pet., 318. In my judgment, that case justifies no such conclusion. It was not even made or suggested in the argument. It was not touched by the judgment of the court. What was that case? Wister brought a suit in the circuit court of the United States in Kentucky against the bank, to recover a sum deposited in the bank. The bank filed a plea to the jurisdiction of the court, alleging that the bank was a body corporate, established by an act of the legislature of Kentucky, and "that the whole capital stock of the said corporation is exclusively and solely the property of the state, and that the state, in her political sovereign capacity as a state, is the sole and exclusive and only member of the corporation." The court decided that the suit was rightfully brought against the corporation, and was within the jurisdiction of the circuit court. Why? Because the court were of opinion that, though the corporation was created by the state, the state was not even a member of the corporation. "The president and directors alone (said Mr. Justice Johnson, in delivering the opinion of the court) constitute the body corporate, the metaphysical person liable to suit. Hence, by the laws of the state itself, it is excluded from



the character of a party, in the sense of the law, when speaking of a body corporate." And in confirmation of this view of the matter a passage was cited from the opinion in *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat., 904. The learned judge then said,—and this is the comment on which so much reliance has been placed: "To which it may be added that, if a state did exercise any other power in or over a bank, or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such banks from a direct issue of bills of credit, which violation of the constitution no doubt the state here intended to avoid." Now this language imports, at most, only that a case might have existed which would have been a violation of the constitution, but which was admitted not to be the case before the court, that is, where the state imparted its sovereign attributes to the corporation. The court do not say that the constitution of the United States had not been violated by the issue of the bank-bills, for that question was never presented for their consideration; but only say that the state did not intend to violate the constitution, and did not intend to communicate its sovereign attributes. Neither the facts of the case, nor the declaration, nor the plea to the jurisdiction, in any manner raised, or could raise, any such question. The corporation, as such, was capable of suing and being sued, by the laws of Kentucky. However proper, then, the language might have been as an admonition of the danger to the bank, if their ground of objection to the jurisdiction was maintainable, it did not commit the court in the slightest manner to any definitive opinion as to the constitutionality of its issues of bank paper.

Let us now proceed to the consideration of the charter of the bank, and ascertain whether it is a mere agent of the state, and what are the powers and authorities which are given to it as to the issues of bank-bills. The act of 1820 declares, in the first section, that a bank shall be, and thereby is, established, "in the name and on behalf of the commonwealth of Kentucky," under the direction of a president and twelve directors, to be chosen by the legislature from time to time by joint ballot of both houses. The second section declares the president and directors a corporation by the corporate name, etc., conferring on the corporation the usual powers. The third section declares that the whole capital stock of the bank shall be exclusively the property of the commonwealth of Kentucky; and no individual or corporation shall be permitted to own or pay for any part of the capital of the bank. The fourth section declares that the president and directors shall have power to issue notes not under the denomination of \$1, nor over \$100, signed by the president and countersigned by the cashier. These bills or notes are, by subsequent sections, authorized to be made payable to order or to bearer, and to be negotiable accordingly; and they are declared to be receivable at the treasury, and by public officers in all payments of taxes and other debts to the state, and for county levies, and are to be payable and redeemable in gold and silver. The capital stock of the bank is to consist of \$2,000,000, to be raised and paid as follows: All moneys paid into the treasury for the purchase of vacant lands of the state, and so much of capital stock owned by the state in the Bank of Kentucky (which it seems had then stopped payment) as may belong to the state, after the affairs of that bank were settled up, with the profits thereof not heretofore pledged or appropriated by law. And the treasurer of the state was required, from time to time, as he received moneys or any of these accounts, to pay them to the bank. By other sections, the bank was authorized

to discount bills of exchange and notes, and to receive deposits, and to loan money on mortgage on real estate, distributing their loans in certain proportions among the citizens of the different counties; and the interest arising from all loans and discounts, after payment of expenses, was to be considered as part of the annual revenue of the state, and subject to the disposition of the legislature. The notes of the Bank of Kentucky were also receivable in payment of all debts due to the Commonwealth Bank.

§ 555. *The "Bank of the Commonwealth of Kentucky" was a mere artificial body or corporation, created for the sole benefit of the state of Kentucky.*

Such are the principal provisions of the charter. It is clear, therefore, that the bank was a mere artificial body or corporation, created for the sole benefit of the state, and in which no other person had or could have any share or interest. The president and directors were the mere agents of the state, appointed and removable at its pleasure. The whole capital stock to be provided consisted of the proceeds of the public lands and other property of the state, which should be paid over to the bank from time to time by the treasurer of the state. The public lands themselves and the other funds were not originally conveyed to or vested in the corporation, but were left in the free possession of the state itself. The president and directors had no interest whatsoever in the institution, but only had the management of it, subject to the control of the state. They were not personally liable for non-payment of any of the bills, or notes, or debts of the bank, but only for their personal misconduct in any excess of issues or debts beyond double the amount of the capital stock. The state was entitled to all the profits. And though the bills and notes of the bank were declared payable in gold and silver, it seems that no human being was made directly responsible for the payment; not the president and directors in their private capacity, for they contracted no personal responsibility; and not the state (as we have been told at the argument), because the state had not, in its own name, promised to pay them; nay, it is said that these bills and notes were not even issued on the credit of the state.

§ 556. — *and the state was the equitable owner of said bank, and possessed unlimited power over it.*

Another thing is quite clear, and that is that as the bank existed for the sole benefit of the state, and all its officers were appointed by the state, and removable at its pleasure, the state possessed an unlimited power over the corporation. The whole funds possessed by it, whether they were capital stock, or debts, or securities, or real estate, or bank-notes, belonged in fact to the state. The state was the equitable owner, and might at any time, without any violation of the rights of the corporation, which was its own exclusive agent, resume and appropriate these funds to itself, and might at its own pleasure repeal and annihilate the charter, and by its sovereign legislative act become, *ipso facto*, the legal owner, as it was in fact the equitable owner, of the property and franchise. I know of no principle of law, or of the constitution, which would have been violated by such a course; for it would have been only conferring upon the equitable owner the legal title to his own estate and property, and resuming, on the part of the principal, the funds and the business confided to his agents.

§ 557. — *the bills and notes of said bank were to circulate as currency, and, stripped of technical forms, were really bills of the state.*

The bills or notes of the bank were to circulate as currency. That is so palpable on the face of the charter as not to have been even questioned at the

argument. They were, then, stripped of mere technical forms, the bills of the state, issued by the agent of the state, on the exclusive funds of the state, for the benefit and profit of the state, to circulate as currency within the state, and without any other responsibility than that of the state. In what respect, then, do they differ from bills of credit of the state? I can perceive none. In the first place, it is said that they were not issued on the credit of the state, and that the state is not responsible, directly or indirectly, for their payment. I confess, until I heard the argument at the bar, I had not supposed that any such proposition would be maintained, or could be maintainable. If these bills were not issued on the credit of the state, on whose credit were they issued? It is said that they were issued on the credit of the corporation; and what is the corporation? A mere metaphysical being, the creature and agent of the state, having no personal existence, and incapable, *per se*, of any personal responsibility. The president and directors constituted that corporation, and were its sole members, and they were not personally liable. The official legal entity, called the president and directors, might be sued. But what then? The capital stock was not vested in them, so as to be liable to be taken in execution in a suit against them. Could a creditor of the corporation seize or sell the public land on his execution against them? No one pretends that. Suppose the state should choose, as it well might, to assume the whole agency and funds of the corporation to itself; could the creditor have any redress against the state? It is admitted that he could not have any redress, because the state is not suable.

It is said that the bills are not taken on the credit of the state, because the state has not promised, in terms, to pay them. If it had so promised, the state, not being suable, the holder could here have no redress against the state. But I insist that, in equity and in justice, the bills must be treated as the bills of the state; and that if the state were suable, a bill in equity would lie against the state, as the real debtor, as the real principal; and I say this upon principles of eternal justice, and upon principles as old as the foundations of the common law itself. How can it be truly said that these bills were not taken on the credit of the state? Were they not to be paid out of the proceeds of the public lands and other property of the state? Were they not receivable in payment of debts to the state, for the very reason that they were the issues of the state for its own benefit? And was not credit given to the state upon this very ground? It has been said at the argument that funds were provided for the payment of the bills by the provisions of the charter, and therefore no credit to the state, *ultra* these funds, can be inferred. But surely the case of the old colonial bills of credit answers that position. They had funds assigned for their redemption; they in many cases had mortgages upon loans authorized to be made, as they are in the present charter; and yet the legislature called them bills of credit. The colonies did not promise to pay them; and yet they deemed them their bills of credit. Why? Because in truth, and in fact, and not upon any metaphysical subtleties and fictions, they were issued upon the general credit of the state; and if the funds pledged fell short of the payment, the state was bound to redeem them. The argument on this head assumes the very matter in controversy. It assumes that the state never directly, or ultimately, held itself out as responsible for the payment of the bills; but that the holder trusted, and trusted exclusively, to the funds provided for him in the charter. Now, I deny this inference altogether. Because a state assigns funds for the payments of its debts or bills, does it follow that the holder trusts exclusively

to those funds? When a creditor takes a pledge, or has a security for payment of his debt, does he thereby exonerate the debtor from all personal responsibility? If the agent is authorized to pledge certain funds of his principal for the payment of the debt, does that exonerate the principal from all personal liability? No such doctrine has ever yet been established, to my knowledge, in any code of law; and, least of all, in the common law. On the contrary, it is at the common law held incumbent on those who insist that there has been any exclusive credit given to a fund, to establish that fact by clear and irresistible proofs.

Suppose in this very case the corporation had circulated, as it had a right to do, its own bank-bills to the amount of \$5,000,000; and the funds assigned by the state, and the funds in the hands of the corporation, had been wholly inadequate to redeem them; would not the state have been bound in reason, in justice, and in equity, to pay the deficiency? Would a court of equity, for a moment, tolerate any private person to escape, under such circumstances, from his own responsibility for the acts and conduct of his agent, fully authorized by him? Would it not say, *qui sentit commodum, sentire debet et onus*? Would it be consistent with good faith for a state to proclaim that it was not bound by the solemn obligations of its own agents, acting officially for its own exclusive benefit and interest, and upon its own funds, to the payment of debts thus justly and honestly contracted? I put these questions, because it seems to me that they can be answered only one way; and that is, by affirming the positive responsibility of the state, *in foro justitiæ*. The citizens must be presumed to trust, in all such cases, to the general credit and good faith of the state, and not merely to the fund contemplated or provided for their redemption. So, in similar cases, the colonies understood their own obligations. So the continental congress, and so the United States, have constantly understood their own obligations. Although a fund may have been provided for payment of their bills of credit; although those bills of credit contained no direct promise of the state; although they purported, in form, to be the acts of trustees, or commissioners, or committees acting under the authority of the state,—yet they well understood that the general credit of the state, for the redemption of the bills, was necessarily implied; and that without that silent necessary pledge, the bills could not, and would not, have circulated at all, except upon compulsion, and by irresistible power of the government.

It is obvious that whether a state be suable or not cannot constitute a test whether an instrument of currency, issued by or on behalf of a state, be a bill of credit or not. It may be a bill of credit, although the state is not suable thereon; as was, in fact, the case with all the anti-revolutionary bills of credit; for the colonies never were suable. On the other hand, the state may expressly allow itself to be sued on an instrument issued in its behalf; and yet it may not be a bill of credit. As, for example, a state may authorize suits to be brought for debts due by itself; and if it should issue, through its officers, a certificate of a loan for money borrowed, if it were not intended to pass as currency, it would not be a bill of credit.

But it is said that here the state was not only not suable on these bank-bills, but that the corporation itself was expressly suable under the charter, and the promise to pay was made by the corporation; and the promise being made by the corporation, it, in effect, excludes any obligation on the part of the state. There is no magic in words. What was this corporation in fact? A mere legal entity; a mere agent of the state, existing for the state, with funds belonging

to the state, and dealing wholly upon the credit which these bills derived from the state. The persons who were president and directors for the time being were not, as I have already said, personally liable for the payment of those bills. The metaphysical personage only was liable; and the promise, if it is not to be treated as a mere delusion and phantom, was the promise of the state itself, through that personage. Suppose the state had authorized its treasurer, in his official capacity, and without any personal liability, to issue these very bank-bills, saying, "I, A. B., as treasurer, promise to pay," etc., and the whole proceeds of these bills were to be for the benefit of the state, and they were to be paid out of the funds of the state in the treasury, could there be a doubt that the state would, in truth, be the real debtor? That they would be issued on its credit? That the state would, in conscience, in common honesty, in justice, be responsible for their payment? If this would be true, in such a case, I should be glad to know in what respect that case substantially differs from the one before the court. It is precisely the very case, and in the same predicament, as the bills of credit issued by Maryland in 1733 and 1769. There the commissioners were created a corporation, and were to issue the bills, and were authorized to sue and be sued; and no one ever dreamed, and least of all the state itself, that they were not the bills of credit of the state. If a state can, by so simple a device as the creation of a corporation, as its own agent, emit paper currency on its own funds, and thus escape the solemn prohibitions of the constitution, the prohibition is a dead letter. It is worse than a mockery. If we mean to give the constitution any rational interpretation on this subject, we must look behind forms and examine things. We must ascertain for whose benefit, on whose credit, with whose funds, for what purposes, of currency or otherwise, the instrument is created and the agency established. Whether it be the issue of a treasurer of a state, or of a corporation of a state, or of any other official personage, must be wholly immaterial. The real question must be, in all cases, whether, in substance, it is the paper currency of the state?

§ 558. *The constitution of the United States does not prohibit private individuals, banks or corporations from issuing bills of credit.*

But it has been argued, that, if this bank be unconstitutional, all state banks founded on private capital are unconstitutional. That proposition I utterly deny. It is not a legitimate conclusion from any just reasoning applicable to the present case. The constitution does not prohibit the emission of all bills of credit, but only the emission of bills of credit by a state; and when I say by a state, I mean by or in behalf of a state, in whatever form issued. It does not prohibit private persons, or private partnerships, or private corporations, strictly so called, from issuing bills of credit. No evils, or, at least, no permanent evils, have ever flowed from such a source. The history of the country had furnished no examples of that sort, of a durable or widely extended public mischief. And if any should exist, it would be within the competency of the state legislatures to furnish an adequate remedy against such issues by private persons. In point of fact, prohibitions now exist in many states against private banking, and against the issue of private bank paper, with the intent that it shall pass as currency. The mischief was not there. It had never been felt in that direction. It was the issue of bills of credit, as a currency, authorized by the state on its own funds, and for its own purposes, which constituted the real evil to be provided against. The history of such a currency constituted the darkest pages in the American annals, and had been written in the ruin of thousands, who had staked their property upon the public faith, always freely

given, and but too often grossly violated. The great inquiry at the adoption of the constitution was, not whether private banks, corporate or incorporate, should exist; not whether they should be permitted to issue a paper currency or not; but whether the state should issue it on its own account. The anxious inquiry then was, *quis custodiet custodes?* The answer is found in the constitution. But it has, in my judgment (though I am sure my brethren think otherwise), become a mere name. *Stat nominis umbra.*

The states may create banks, as well as other corporations, upon private capital; and so far as this prohibition is concerned, may rightfully authorize them to issue bank bills or notes as currency; subject always to the control of congress, whose powers extend to the entire regulation of the currency of the country. When banks are created upon private capital, they stand upon that capital; and their credit is limited to the personal or corporate responsibility of the stockholders, as provided for in the charter. If the corporate stock, and that only, by the charter, is made liable for the debts of the bank, and that capital stock is paid in, every holder of its bills must be presumed to trust exclusively to the fund thus provided, and the general credit of the corporation. And in such a case, a state owning a portion of the funds, and having paid in its share of the capital stock, is treated like every other stockholder, and is understood to incur no public responsibility whatsoever. It descends to the character of a mere corporator, and does not act in the character of a sovereign. That was the doctrine of this court in *The Bank of United States v. Planters' Bank of Georgia*, 9 Wheat., 904. "It is," said the court on that occasion, "we think, a sound principle, that when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." In the present case the legislature expressly prohibited any partnership or participation with other persons in this bank. It set it up exclusively upon the capital of the state, as the exclusive property of the state, and subject to the exclusive management of the state, through its exclusive agents. It acted, therefore, in its sovereign character and capacity; and could not, even for an instant, even in intendment of law, divest itself, in the transactions of the bank, of that character and capacity.

I have not thought it necessary, in the views which I have taken of this case, to resort to the state of the pleadings, though they fortify every portion of the reasoning which I have endeavored to maintain. One of the averments in the first plea is that the president and directors of the bank were illegally authorized, "for and on behalf of the commonwealth, and upon her credit, to make bills of credit, to emit bills or notes to an amount not exceeding ——— millions of dollars, and when so made, etc., to emit, issue and circulate through the community, for its ordinary purposes, as money." The plea goes on to allege that the president and directors had, before the date of the note sued on, "for and on behalf of the commonwealth of Kentucky, and on her credit, made various bills of credit, namely, notes of various denominations, in amount from \$1 to \$100, etc., promising therein and thereby to pay the person on each note mentioned, or bearer, on demand, the amount therein mentioned in money, and were transferable by delivery." The demurrer admits the truth of these averments; and, upon technical principles of pleading, I do not see how their conclusiveness in the present question can be avoided. But I do not rely on the state of the pleadings. I found my judgment upon the principles presented by the admitted state of the facts, that these bank-bills are bills of credit, within

the true intent and meaning of the constitution; that they were issued by and in behalf of the state, upon the credit of the state, by its authorized agents; and that the issue is a violation of the constitution.

I am conscious that I have occupied a great deal of time in the discussion of this grave question; a question, in my humble judgment, second to none which was ever presented to this court in its intrinsic importance. I have done so, because I am of opinion, as I have already intimated, that, upon constitutional questions, the public have a right to know the opinion of every judge who dissents from the opinion of the court, and the reasons of his dissent. I have another and strong motive: my profound reverence and affection for the dead. Mr. Chief Justice Marshall is not here to speak for himself; and knowing full well the grounds of his opinion, in which I concurred, that this act is unconstitutional, I have felt an earnest desire to vindicate his memory from the imputation of rashness, or want of deep reflection. Had he been living he would have spoken in the joint names of both of us. I am sensible that I have not done that justice to his opinion which his own great mind and exalted talents would have done. But with all the imperfections of my own efforts, I hope that I have shown that there were solid grounds on which to rest his exposition of the constitution. *His saltem accumulem donis, et fungar inani munere.*

The judgment of the court of appeals of the state of Kentucky is affirmed, with costs.

§ 559. **Security for borrowed money.**—The constitution of the United States does not forbid the states or municipal corporations from borrowing money and giving proper securities therefor, and such securities are not bills of credit within the meaning of the constitution. *McCoy v. Washington County*,\* 7 Am. L. Reg., 193.

§ 560. **Confederate treasury notes** are not bills of credit within the meaning of the constitution, and though not void as being within that constitutional provision, they are illegal because issued in aid of the rebellion. *Bailey v. Milner*, 1 Abb., 261.

§ 561. **Bills of a state bank.**—The notes of the Bank of Arkansas are not bills of credit within the prohibition of the constitution, although by the charter they are made receivable in payment of all debts due the state. Although the entire stock of the bank is owned by the state, and the state furnishes the capital and receives the profits, the bills are not made payable by the state, a capital is provided for their redemption, and the general management of the bank is committed, under the charter, to a president and directors, as in ordinary associations. *Woodruff v. Trapnall*,\* 10 How., 190. See §§ 539-558.

§ 562. The State Bank of Alabama was established on the funds of the state. By the charter the president and directors were elected by, and required to report to, the legislature. It was authorized to issue notes of a denomination of not less than one dollar. The ordinary powers of a banking corporation were conferred, with a prohibition against owing debts exceeding twice the amount of the capital; and the directors were made personally responsible for any excess of indebtedment of the bank assented to by them. Until one-half of the capital was deposited in specie in its vaults, the bank was not authorized to commence operations. The remedy for collecting debts was reciprocal for and against the bank. The notes issued were payable on presentation, signed by the president and cashier, were convertible into specie by the holder, and were current. It was held that these notes were not bills of credit, although the credit of the state was pledged for their ultimate redemption. *Darrington v. State Bank of Alabama*,\* 13 How., 12.

§ 563. **Certificates issued by the state of Missouri.**—The "certificates" issued by the state of Missouri in pursuance of the act of the state of June 27, 1821, signed by the auditor and treasurer of the state, issued to the amount of \$200,000, of denominations not exceeding \$10 nor less than fifty cents, purporting on their face to be receivable at the treasury, or at any loan office of the state, in discharge of taxes and debts due the state, being by law receivable in discharge of all taxes or debts due the state, or any county or town therein, and of all salaries and fees of office to all officers, civil and military, within the state, and for salt sold by the lessees of the public salt works, are held to be bills of credit, and void, under the constitution of the United States. *Byrne v. State of Missouri*,\* 8 Pet., 40. See §§ 521-533.

## IV. RETROSPECTIVE AND EX POST FACTO LAWS AND BILLS OF ATTAINDER.

**SUMMARY**—*Constitutional provisions*, § 564.—*Ex post facto laws defined*, §§ 565, 566, 568, 570.—*Changing place of trial*, § 567.—*Law granting a new trial*, § 568.—*Vested rights*, § 569.—*Tax on property out of state*, § 570.—*Retrospective laws*, § 571.—*Bills of attainder defined*, § 572.—*Test oath*, §§ 573-577.—*Pardoning power*, § 578.

§ 564. "No bill of attainder or *ex post facto* law shall be passed." Const., art. I, sec. 9. "No state shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Art. I, sec. 10.

§ 565. *Ex post facto* laws defined, and the distinction between such laws and retrospective laws pointed out. *Calder v. Bull*, §§ 582-599. See §§ 638, 650, 661, 662.

§ 566. By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then required. *Cummings v. State of Missouri*, §§ 608-618.

§ 567. A law changing the place of trial from one county to another county in the same district, or even to a different district, from that in which the offense was committed, or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment. *Gut v. State*, §§ 579-581.

§ 568. The prohibition of the passage of *ex post facto* laws refers only to laws relating to matters of crime. Therefore a law granting a new trial of a suit in probate, and setting aside the decree, is not within its terms. *Calder v. Bull*, §§ 592-599.

§ 569. The restraint against *ex post facto* laws does not extend so far as to prohibit the depriving a citizen of a vested right to property. Rights of property and vested rights considered. *Ibid*.

§ 570. The act of 1850, of the state of Pennsylvania, enacted after the death of a citizen, and requiring the executor to pay a tax on property not within the state out of property in his hands, is not an *ex post facto* law. Former definitions of the term *ex post facto* adhered to. *Carpenter v. Commonwealth of Pennsylvania*, §§ 600-602.

§ 571. The only limit upon the power of the states to enact retrospective laws, and, therefore, the only source of cognizance or control with respect to that power existing in the federal supreme court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts. *Baltimore, etc., R. Co. v. Nesbit*, §§ 603-607.

§ 572. A bill of attainder is a legislative act which inflicts a punishment without a judicial trial; if the punishment is less than death, the act is termed a bill of pains and penalties. *Cummings v. State of Missouri*, §§ 609-618. See § 656.

§ 573. A provision in a state constitution, that no person should be competent as a priest unless he subscribed a test oath, by which he was to swear that he had not aided or sympathized in any manner with the rebellion, is substantially a legislative condemnation for crimes already committed, compelling the condemned to swear to his innocence, and is, therefore, a bill of attainder within the constitutional prohibition, and void. *Ibid*.

§ 574. Such provision is not one to ascertain his qualifications for the office, but a law deliberately intended to punish one for an act which was not punishable at the time of its commission, and is, therefore, *ex post facto* and void. *Ibid*.

§ 575. A state cannot, under the form of creating a qualification or attaching a condition for the pursuit of a calling within its jurisdiction, inflict a punishment for a past act, not punishable at the time it was committed. *Ibid*.

§ 576. An act of congress providing that no person shall be admitted as a counselor at law in the federal courts, or be permitted to practice therein by virtue of a previous admission, until he shall take an oath to the effect that he has never voluntarily borne arms against the United States or given aid and comfort to their enemies, etc., partakes of the nature of a bill of pains and penalties. *Ex parte Garland*, §§ 619-637.

§ 577. The right which an attorney acquires, by virtue of his admission to the bar, is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency. *Ibid*.

§ 578. The power of the president to pardon extends to all known offenses and is not subject to legislative control. *Ibid*.

[NOTES.—See §§ 638-662.]



## GUT v. THE STATE.

(9 Wallace, 85-88. 1869.)

ERROR to the Supreme Court of Minnesota.

STATEMENT OF FACTS.—When the offense charged in this case was committed the state law required that offenses should be tried in the counties in which they were committed. There were attached to Brown county, the county in which the offense was committed, four unorganized counties, for judicial purposes, and pursuant to a law passed in 1867, after the offense was committed, the judge of the district court of Brown county ordered the holding of the court in Redwood county, one of the four counties above mentioned, where the defendant was indicted. On plea of not guilty the case was transferred, at the instance of defendant, to another district, where he was tried and convicted. The point raised is that the law authorizing an indictment and trial in Redwood county was *ex post facto*.

Opinion by MR. JUSTICE FIELD.

The objection to the act of Minnesota, if there be any, does not rest on the ground that it is an *ex post facto* law, and therefore within the inhibition of the federal constitution. It must rest, if it has any force, upon that provision of the state constitution which declares that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law." But the supreme court of the state has held that the act in question is not in conflict with this provision; that the act does not change the district, but merely the place of trial in the district, which is not forbidden. And it appears that jurors for the trial of criminal offenses committed in one of the counties of the several attached together for judicial purposes, are chosen from all the counties; and that this was the law before, as it has been since, the passage of the act which is the subject of complaint. Therefore the defendant, had he not secured, by his own motion, a change of venue, would have had a jury of the district in which the crime was committed, and which district was previously ascertained by law.

§ 579. *Ruling of state court conclusive.*

The ruling of the state court is conclusive upon this court upon the point that the law in question does not violate the constitutional provision cited. *Randall v. Brigham*, 7 Wall., 541; *Provident Institution v. Massachusetts*, 6 id., 630. Undoubtedly the provision securing to the accused a public trial within the county or district in which the offense is committed is of the highest importance. It prevents the possibility of sending him for trial to a remote district, at a distance from friends, among strangers, and perhaps parties animated by prejudices of a personal or partisan character; but its enforcement in cases arising under state laws is not a matter within the jurisdiction of the federal courts.

§ 580. *A law changing the place of trial from one county to another in the same district is not an ex post facto law.*

A law changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offense was committed, or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment.

§ 581. *Ex post facto laws defined.*

An *ex post facto* law does not involve, in any of its definitions, a change of

the place of trial of an alleged offense after its commission. It is defined by Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch, 138 (§§ 1805-12, *infra*), to be a law "which renders an act punishable in a manner in which it was not punishable when it was committed;" and in *Cummings v. State of Missouri*, 4 Wall., 326 (§§ 608-618, *infra*), with somewhat greater fullness, as a law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." The act of Minnesota under consideration has no feature which brings it within either of these definitions.

*Judgment affirmed.*

CALDER v. BULL.

(8 Dallas, 386-401. 1798.)

Opinion by MR. JUSTICE CHASE.

STATEMENT OF FACTS.—The decision of one question determines, in my opinion, the present dispute. I shall, therefore, state from the record no more of the case than I think necessary for the consideration of that question only.

The legislature of Connecticut, on the second Thursday of May, 1795, passed a resolution or law, which, for the reasons assigned, set aside a decree of the court of probate for Hartford, on the 21st of March, 1793, which decree disapproved of the will of Normand Morrison, the grandson, made the 21st of August, 1779, and refused to record the said will; and granted a new hearing by the said court of probate, with liberty of appeal therefrom, in six months. A new hearing was had, in virtue of this resolution, or law, before the said court of probate, who, on the 27th of July, 1795, approved the said will, and ordered it to be recorded. At August, 1795, appeal was then had to the superior court at Hartford, who, at February term, 1796, affirmed the decree of the court of probate. Appeal was had to the supreme court of errors of Connecticut, who, in June, 1796, adjudged that there were no errors. More than eighteen months elapsed from the decree of the court of probate, on the 1st of March, 1793, and thereby Caleb Bull and wife were barred of all right of appeal by a statute of Connecticut. There was no law of that state whereby a new hearing, or trial, before the said court of probate might be obtained. Calder and wife claim the premises in question, in right of his wife, as heiress of N. Morrison, physician; Bull and wife claim under the will of N. Morrison, the grandson. The counsel for the plaintiffs in error contend that the said resolution or law of the legislature of Connecticut, granting a new hearing in the above case, is an *ex post facto* law, prohibited by the constitution of the United States; that any law of the federal government, or of any of the state governments, contrary to the constitution of the United States, is void; and that this court possesses the power to declare such law void.

§ 582. *The states retained all powers of legislation not delegated to the United States.*

It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation delegated to them by the state constitutions which are not expressly taken away by the constitution of the United States. The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice within each state, according to its laws, on all subjects not intrusted to the federal government, appear to me to

be the peculiar and exclusive province and duty of the state legislatures. All the powers delegated by the people of the United States to the federal government are defined, and no constructive powers can be exercised by it, and all the powers that remain in the state governments are indefinite, except only in the constitution of Massachusetts. The effect of the resolution or law of Connecticut above stated is to revise a decision of one of its inferior courts, called the court of probate for Hartford, and to direct a new hearing of the case by the same court of probate that passed the decree against the will of Normand Morrison. By the existing law of Connecticut, a right to recover certain property had vested in Calder and wife (the appellants) in consequence of a decision of a court of justice, but, in virtue of a subsequent resolution or law, and the new hearing thereof, and the decision in consequence, this right to recover certain property was divested, and the right to the property declared to be in Bull and wife, the appellees. The sole inquiry is, whether this resolution or law of Connecticut, having such operation, is an *ex post facto* law, within the prohibition of the federal constitution?

§ 583. *Quære, as to the power of state legislatures.*

Whether the legislature of any of the states can revise and correct, by law, a decision of any of its courts of justice, although not prohibited by the constitution of the state, is a question of very great importance, and not necessary now to be determined, because the resolution or law in question does not go so far. I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state. The people of the United States erected their constitutions or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the federal or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law, or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean.

§ 584. — *inherent powers of a legislature and natural limitations thereof.*

A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B. It is against all reason and justice for a people to intrust a legislature with such powers; and, therefore, it cannot be presumed that they

have done it. The genius, the nature and the spirit of our state governments amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our federal or state legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in our free republican governments.

§ 585. *Causes which led to the prohibition of the passage of ex post facto laws by the states.*

All the restrictions contained in the constitution of the United States on the power of the state legislatures were provided in favor of the authority of the federal government. The prohibition against their making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge that the parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder or bills of pains and penalties; the first inflicting capital, and the other less, punishment. These acts were legislative judgments, and an exercise of judicial power. Sometimes they respected the crime, by declaring acts to be treason which were not treason when committed (Case of Earl of Strafford, in 1640); at other times they violated the rules of evidence, to supply a deficiency of legal proof, by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony which the courts of justice would not admit (Case of Sir John Fenwick, in 1696); at other times they inflicted punishments where the party was not by law liable to any punishment (The banishment of Lord Clarendon, 1667; 19 Car. 2, c. 10; and of Bishop Atterbury, in 1723; 9 Geo. 1, c. 17); and in other cases they inflicted greater punishment than the law annexed to the offense. The Conventry Act, in 1670, 22 & 23 Car. 2, c. 1. The ground for the exercise of such legislative power was this: that the safety of the kingdom depended on the death, or other punishment, of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure. With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe the federal and state legislatures were prohibited from passing any bill of attainder, or any *ex post facto* law.

The constitution of the United States, art. 1, sec. 9, prohibits the legislature of the United States from passing any *ex post facto* law; and in section 10 lays several restrictions on the authority of the legislatures of the several states; and among them, "that no state shall pass any *ex post facto* law." It may be remembered that the legislatures of several of the states, to wit, Massachusetts, Pennsylvania, Delaware, Maryland, and North and South Carolina, are expressly prohibited, by their state constitutions, from passing any *ex post facto* law.

§ 586. *Ex post facto laws defined.*

I shall endeavor to show what law is to be considered an *ex post facto* law, within the words and meaning of the prohibition in the federal constitution. The prohibition, "that no state shall pass any *ex post facto* law," necessarily

requires some explanation; for naked, and without explanation, it is unintelligible and means nothing. Literally it is only that a law shall not be passed concerning and after the fact, or thing done, or action committed. I would ask, what fact; of what nature or kind; and by whom done? That Charles I., king of England, was beheaded; that Oliver Cromwell was protector of England; that Louis XVI., late king of France, was guillotined, are all facts that have happened; but it would be nonsense to suppose that the states were prohibited from making any law after either of these events, and with reference thereto.

§ 587. *Object of the prohibition as to ex post facto laws.*

The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several states shall not pass laws after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any *ex post facto* law was to secure the person of the subject from injury or punishment in consequence of such law. If the prohibition against making *ex post facto* laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

§ 588. *Instances of ex post facto laws.*

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive.

§ 589. *Distinction between ex post facto and retrospective laws. Further illustrations and definitions.*

In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed. But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law;

but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime. The expressions "*ex post facto* laws" are technical; they had been in use long before the Revolution, and had acquired an appropriate meaning, by legislators, lawyers and authors. The celebrated and judicious Sir William Blackstone, in his Commentaries, considers an *ex post facto* law precisely in the same light I have done. His opinion is confirmed by his successor, Mr. Wooddeson, and by the author of the Federalist, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government.

I also rely greatly on the definition, or explanation, of *ex post facto* laws, as given by the conventions of Massachusetts, Maryland and North Carolina, in their several constitutions, or forms of government. In the declaration of rights, by the convention of Massachusetts, part first, section 24, "Laws made to punish actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust," etc. In the declaration of rights, by the convention of Maryland, article 15, "Retrospective laws punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive," etc. In the declaration of rights by the convention of North Carolina, article 24, I find the same definition, precisely in the same words as in the Maryland constitution. In the declaration of rights by the convention of Delaware, article 11, the same definition was clearly intended, but inaccurately expressed, by saying, "laws punishing offenses (instead of actions, or facts) committed before the existence of such laws are oppressive," etc. I am of opinion that the fact contemplated by the prohibition, and not to be affected by a subsequent law, was some fact to be done by a citizen or subject. In 2 Lord Raymond, 1352, Raymond, J., called the Stat. 7 Geo. 1 (Stat. 2, pt. 8), about registering contracts for South Sea stock, an *ex post facto* law, because it affected contracts made before the statute.

§ 590. *A law setting aside a decree of probate and ordering a new trial is not an ex post facto law.*

In the present case, there is no fact done by Bull and wife, plaintiffs in error, that is in any manner affected by the law or resolution of Connecticut; it does not concern or relate to any act done by them. The decree of the court of probate of Hartford, on the 21st March, in consequence of which Calder and wife claim a right to the property in question, was given before the said law or resolution, and in that sense was affected and set aside by it; and in consequence of the law allowing a hearing and a decision in favor of the will, they have lost what they would have been entitled to, if the law or resolution, and the decision in consequence thereof, had not been made. The decree of the court of probate is the only fact on which the law or resolution operates. In my judgment, the case of the plaintiffs in error is not within the letter of the prohibition; and, for the reasons assigned, I am clearly of opinion that it is not within the intention of the prohibition; and if within the intention, but out of the letter, I should not, therefore, consider myself justified to continue it within the prohibition, and therefore that the whole was void. It was argued

by the counsel for the plaintiffs in error that the legislature of Connecticut had no constitutional power to make the resolution or law in question, granting a new hearing, etc.

§ 591. *This court has no jurisdiction to decide that any law of a state, contrary to its constitution, is void. The state courts are the proper tribunals to decide that question.*

Without giving an opinion, at this time, whether this court has jurisdiction to decide that any law made by congress, contrary to the constitution of the United States, is void, I am fully satisfied that this court has no jurisdiction to determine that any law of any state legislature, contrary to the constitution of such state, is void. Further, if this court had such jurisdiction, yet it does not appear to me that the resolution or law in question is contrary to the charter of Connecticut, or its constitution, which is said by counsel to be composed of its charter, acts of assembly, and usages and customs. I should think that the courts of Connecticut are the proper tribunals to decide whether laws contrary to the constitution thereof are void. In the present case they have, both in the inferior and superior courts, determined that the resolution or law in question was not contrary to either their state or the federal constitution.

§ 592. *The term ex post facto relates only to laws upon matters of a criminal character.*

To show that the resolution was contrary to the constitution of the United States, it was contended that the words, *ex post facto* law, have a precise and accurate meaning, and convey but one idea to professional men, which is, "by matter of after fact; by something after the fact." And Co. Litt., 241; Fearn's Cont. Rem. (old ed.), 175 and 203; Powell on Devises, 113, 133, 134, were cited; and the table to Coke's Reports (by Wilson), title *Ex Post Facto*, was referred to. There is no doubt that a man may be a trespasser from the beginning by matter of after fact; as where an entry is given by law, and the party abuses it; or where the law gives a distress, and the party kills or works the distress. I admit, an act unlawful in the beginning may in some cases become lawful by matter of after fact. I also agree that the words "*ex post facto*" have the meaning contended for, and no other, in the cases cited, and in all similar cases where they are used unconnected with, and without relation to, legislative acts or laws. There appears to me a manifest distinction between the case where one fact relates to and affects another fact, as where an after fact, by operation of law, makes a former fact either lawful or unlawful, and the case where a law made after a fact done is to operate on, and to affect, such fact. In the first case both the acts are done by private persons. In the second case the first act is done by a private person, and the second act is done by the legislature to affect the first act. I believe that but one instance can be found in which a British judge called a statute that affected contracts, made before the statute, an *ex post facto* law; but the judges of Great Britain always considered penal statutes that created crimes, or increased the punishment of them, as *ex post facto* laws. If the term *ex post facto* law is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the federal and state legislatures, and the consequences of such a construction may not be foreseen. If the prohibition to make no *ex post facto* law extends to all laws made after the fact, the two prohibitions, not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were improper and unnecessary.

§ 593. *Rights of property; vested rights defined.*

It was further urged, that, if the provision does not extend to prohibit the making any law after a fact, then all *choses in action*, all lands by devise, all personal property by bequest or distribution, by *elegit*, by execution, by judgments, particularly on *torts*, will be unprotected from the legislative power of the states; rights vested may be divested at the will and pleasure of the state legislatures; and, therefore, that the true construction and meaning of the prohibition is, that the states pass no law to deprive a citizen of any right vested in him by existing laws. It is not to be presumed that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws, unless for the benefit of the whole community, and on making full satisfaction. The restraint against making any *ex post facto* laws was not considered by the framers of the constitution as extending to prohibit the depriving a citizen even of a vested right to property; or the provision "that private property should not be taken for public use without just compensation," was unnecessary. It seems to me that the right of property, in its origin, could only arise from compact, express or implied, and I think it the better opinion that the right, as well as the mode or manner, of acquiring property, and of alienating or transferring, inheriting or transmitting it, is conferred by society, is regulated by civil institution, and is always subject to the rules prescribed by positive law. When I say that a right is vested in a citizen, I mean that he has the power to do certain actions or to possess certain things according to the law of the land.

§ 594. *A right to recover property is not a perfect and exclusive right.*

If any one has a right to property, such right is a perfect and exclusive right; but no one can have such right before he has acquired a better right to the property than any other person in the world; a right, therefore, only to recover property cannot be called a perfect and exclusive right. I cannot agree that a right to property vested in Calder and wife in consequence of the decree of the 21st of March, 1783, disapproving of the will of Morrison, the grandson. If the will was valid, Mrs. Calder would have no right, as heiress of Morrison, the physician; but if the will was set aside, she had an undoubted title. The resolution or law, alone, had no manner of effect on any right whatever vested in Calder and wife. The resolution or law, combined with the new hearing, and the decision in virtue of it, took away their right to recover the property in question. But when combined, they took away no right of property vested in Calder and wife, because the decree against the will, 21st March, 1783, did not vest in or transfer any property to them. I am under a necessity to give a construction or explanation of the words "*ex post facto* law," because they have not any certain meaning attached to them. But I will not go farther than I feel myself bound to do; and if I ever exercise the jurisdiction, I will not decide any law to be void but in a very clear case.

I am of the opinion that the decree of the supreme court of errors of Connecticut be affirmed, with costs.

Opinion by MR. JUSTICE PATERSON.

The constitution of Connecticut is made up of usages, and it appears that its legislature have, from the beginning, exercised the power of granting new trials. This has been uniformly the case till the year 1762, when this power was, by a legislative act, imparted to the superior and county courts. But the act does



not remove or annihilate the pre-existing power of the legislature in this particular; it only communicates to other authorities a concurrence of jurisdiction as to the awarding of new trials. And the fact is that the legislature have, in two instances, exercised this power since the passing of the law in 1762. They acted in a double capacity — as a house of legislation, with undefined authority, and also as a court of judicature in certain exigencies. Whether the latter arose from the indefinite nature of their legislative powers, or in some other way, it is not necessary to discuss.

§ 595. *Power of the legislature of Connecticut to order a new trial.*

From the best information, however, which I have been able to collect on this subject, it appears that the legislature, or general court, of Connecticut, originally possessed and exercised all legislative, executive and judicial authority; and that, from time to time, they distributed the two latter in such manner as they thought proper, but without parting with the general superintending power, or the right of exercising the same whenever they should judge it expedient. But be this as it may, it is sufficient for the present to observe that they have, on certain occasions, exercised judicial authority from the commencement of their civil polity. This usage makes up part of the constitution of Connecticut, and we are bound to consider it as such, unless it be inconsistent with the constitution of the United States. True it is, that the awarding of new trials falls properly within the province of the judiciary; but if the legislature of Connecticut have been in the uninterrupted exercise of this authority in certain cases, we must, in such cases, respect their decisions as flowing from a competent jurisdiction or constitutional organ. And, therefore, we may, in the present instance, consider the legislature of the state as having acted in their customary judicial capacity. If so, there is an end of the question. For if the power thus exercised comes more properly within the description of a judicial than of a legislative power; and if by usage, or the constitution, which, in Connecticut, are synonymous terms, the legislature of that state acted in both capacities, — then in the case now before us, it would be fair to consider the awarding of a new trial as an act emanating from the judiciary side of the department.

§ 596. *The words ex post facto refer to crimes, pains and penalties.*

But as this view of the subject militates against the plaintiffs in error, their counsel has contended for a reversal of the judgment, on the ground that the awarding of a new trial was the effect of a legislative act, and that it is unconstitutional, because an *ex post facto* law. For the sake of ascertaining the meaning of these terms, I will consider the resolution of the general court of Connecticut as the exercise of a legislative and not a judicial authority. The question, then, which arises on the pleadings in this cause is, whether the resolution of the legislature of Connecticut be an *ex post facto* law, within the meaning of the constitution of the United States? I am of opinion that it is not. The words, *ex post facto*, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains and penalties. Judge Blackstone's description of the terms is clear and accurate. "There is," says he, "a still more unreasonable method than this, which is called making of laws, *ex post facto*, when after an action, indifferent in itself, is committed, the legislator, then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had, therefore, no

cause to abstain from it; and all punishment for not abstaining, must, of consequence, be cruel and unjust." 1 Bl. Comm., 46. Here the meaning, annexed to the terms *ex post facto* laws, unquestionably refers to crimes and nothing else. The historic page abundantly evinces that the power of passing such laws should be withheld from legislators, as it is a dangerous instrument in the hands of bold, unprincipled, aspiring and party men, and has been too often used to effect the most detestable purposes.

On inspecting such of our state constitutions as take notice of laws made *ex post facto*, we shall find that they are understood in the same sense. The constitution of Massachusetts, article 24 of the declaration of rights:

"Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government."

The constitution of Delaware, article 11 of the declaration of rights: "That retrospective laws, punishing offenses committed before the existence of such laws, are oppressive and unjust, and ought not to be made."

The constitution of Maryland, article 15 of the declaration of rights: "That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made."

The constitution of North Carolina, article 24 of the declaration of rights: "That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made."

From the above passages it appears that *ex post facto* laws have an appropriate signification; they extend to penal statutes, and no further; they are restricted in legal estimation to the creation, and perhaps enhancement, of crimes, pains and penalties. The enhancement of a crime or penalty seems to come within the same mischief as the creation of a crime or penalty; and, therefore, they may be classed together.

§ 597. — *and the connection in which those words are used in the federal constitution substantiates this conclusion.*

Again, the words of the constitution of the United States are, "That no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Art 1, sec. 10. Where is the necessity or use of the latter words, if a law impairing the obligation of contracts be comprehended within the terms *ex post facto* law? It is obvious from the specification of contracts in the last member of the clause, that the framers of the constitution did not understand or use the words in the sense contended for on the part of the plaintiffs in error. They understood and used the words in their known and appropriate signification, as referring to crimes, pains and penalties, and no further. The arrangement of the distinct members of this section necessarily points to this meaning. I had an ardent desire to have extended the provision in the constitution to retrospective laws in general. There is neither policy nor safety in such laws; and, therefore, I have always had a strong aversion against them. It may in general be truly observed of retrospective laws of every description, that they neither accord with sound legislation nor the fundamental principles of the social compact. But, on full consideration, I am convinced that *ex post facto* laws must be limited in the manner already expressed; they must be taken in their technical, which is also their common and general, acceptation, and are not to be understood in their literal sense.

Opinion by MR. JUSTICE IREDELL.

Though I concur in the general result of the opinions which have been delivered, I cannot entirely adopt the reasons that are assigned upon the occasion.

From the best information to be collected relative to the constitution of Connecticut, it appears that the legislature of that state has been in the uniform, uninterrupted habit of exercising a general superintending power over its courts of law by granting new trials. It may, indeed, appear strange to some of us that in any form there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions; but such is the established usage of Connecticut, and it is obviously consistent with the general superintending authority of her legislature. Nor is it altogether without some sanction for a legislature to act as a court of justice. In England, we know, that one branch of the parliament, the house of lords, not only exercises a judicial power in cases of impeachment and for the trial of its own members, but as the court of dernier resort takes cognizance of many suits at law and in equity; and that in construction of law the jurisdiction there exercised is by the king in full parliament, which shows that, in its origin, the causes were probably heard before the whole parliament. When Connecticut was settled the right of empowering her legislature to superintend the courts of justice was, I presume, early assumed; and its expediency, as applied to the local circumstances and municipal policy of the state, is sanctioned by a long and uniform practice. The power, however, is judicial in its nature, and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative authority.

But let us for a moment suppose that the resolution granting a new trial was a legislative act; it will by no means follow that it is an act affected by the constitutional prohibition that "no state shall pass any *ex post facto* law." I will endeavor to state the general principles, which influence me on this point, succinctly and clearly, though I have not had an opportunity to reduce my opinion to writing. If, then, a government, composed of legislative, executive and judicial departments were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true that some speculative jurists have held that a legislative act against natural justice must, in itself, be void; but I cannot think that under such a government any court of justice would possess a power to declare it so. Sir William Blackstone, having put the strong case of an act of parliament which should authorize a man to try his own cause, explicitly adds that even in that case "there is no court that has power to defeat the intent of the legislature when couched in such evident and express words as leave no doubt whether it was the intent of the legislature or no." 1 Bl. Comm., 91.

§ 598. *Rules which govern courts in construing statutes with reference to their constitutionality.*

In order, therefore, to guard against so great an evil, it has been the policy of all the American states which have, individually, framed their state constitutions since the Revolution; and of the people of the United States, when they framed the federal constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled bound-

aries. If any act of congress or of the legislature of a state violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law within the general scope of their constitutional power, the court cannot pronounce it to be void merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject, and all that the court could properly say, in such an event, would be that the legislature, possessed of an equal right of opinion, had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights in which the subject can be viewed: 1st. If the legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid. In the former case they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust; but in the latter case they violate a fundamental law, which must be our guide whenever we are called upon as judges to determine the validity of a legislative act.

§ 599. *Ex post facto refers only to criminal cases.*

Still, however, in the present instance, the act or resolution of the legislature of Connecticut cannot be regarded as an *ex post facto* law; for the true construction of the prohibition extends to criminal, not to civil, cases. It is only in criminal cases, indeed, in which the danger to be guarded against is greatly to be apprehended. The history of every country in Europe will furnish flagrant instances of tyranny exercised under the pretext of penal dispensations. Rival factions, in their efforts to crush each other, have superseded all the forms, and suppressed all the sentiments, of justice; while attainders, on the principle of retaliation and proscriptions, have marked all the vicissitudes of party triumph. The temptation to such abuses of power is unfortunately too alluring for human virtue; and, therefore, the framers of the American constitutions have wisely denied to the respective legislatures, federal as well as state, the possession of the power itself. They shall not pass any *ex post facto* law; or, in other words, they shall not inflict a punishment for any act which was innocent at the time it was committed; nor increase the degree of punishment previously denounced for any specific offense.

The policy, the reason, and humanity of the prohibition do not, I repeat, extend to civil cases, to cases that merely affect the private property of citizens. Some of the most necessary and important acts of legislation are, on the contrary, founded upon the principle that private rights must yield to public exigencies. Highways are run through private grounds. Fortifications, light-houses, and other public edifices, are necessarily sometimes built upon the soil owned by individuals. In such and similar cases, if the owners should refuse voluntarily to accommodate the public, they must be constrained, as far as the public necessities require; and justice is done, by allowing them a reasonable equivalent. Without the possession of this power the operations of government would often be obstructed, and society itself would be endangered. It is not sufficient to urge that the power may be abused, for such is the nature of all power,—such is the tendency of every human institution; and it might as fairly be said, that the power of taxation, which is only circumscribed by

the discretion of the body in which it is vested, ought not to be granted, because the legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence. It is our consolation that there never existed a government, in ancient or modern times, more free from danger in this respect than the governments of America.

Upon the whole, though there cannot be a case in which an *ex post facto* law in criminal matters is requisite, or justifiable, for Providence never can intend to promote the prosperity of any country by bad means, yet, in the present instance, the objection does not arise: Because, first, if the act of the legislature of Connecticut was a judicial act, it is not within the words of the constitution; and second, even if it was a legislative act, it is not within the meaning of the prohibition.

*Affirmed.*

#### CARPENTER v. COMMONWEALTH OF PENNSYLVANIA.

(17 Howard, 456-464. 1854.)

ERROR to the Supreme Court of Pennsylvania.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—The legislature of Pennsylvania, in 1826, adopted a law by which all inheritances “being within this commonwealth,” which by the intestacy or the will of any decedent should devolve “upon any other than the father, mother, wife, children or lineal descendants” of such person, should be subject to the payment of a tax now fixed at five per cent. *Purd. Dig.*, 138, § 1. The assessments under this act were confined to the property which might be within the commonwealth. *The Commonwealth v. Smith*, 5 Barr., 142. In March, 1850, by an explanatory act, it was declared that the words “being within the commonwealth shall be so construed as to relate to all persons who have been at the time of their decease, or now may be, domiciled within this commonwealth, as well as to estates, and this is declared to be the true intent and meaning of this act.”

William Short, a citizen of Pennsylvania, died within the state a few months previously to the passage of this act, leaving his property to friends and collateral relations, the principal of whom, the residuary legatees, reside beyond the limits of the state. The will was proven by a resident executor in December, 1849, before the register's court in Philadelphia, and a settlement was made with that court in June of the following year. In that settlement the executor represented that a portion of the estate, consisting of securities, stocks, loans and evidences of debt and property, was not within the commonwealth, and offered to pay the tax for the property within, under the act of 1826, and denied the validity of the assessment under the act of 1850. The tax was assessed upon the entire personal estate, without reference to its locality, by the court, and its judgment upon this subject was affirmed by the supreme court, to which it was removed by *certiorari*. That court says: “More pointed words to make the act (of 1850) retrospective could not be chosen; and it will scarce be said the legislature had not power to make it so, at least while the assets remain in the hands of the executor as administrator. No clause of the constitution forbids it to extend a tax already laid or to tax assets not taxed before; and, in establishing its peculiar interpretation, it has

only done indirectly what it was competent to do directly." The supreme court thus interprets the act of 1850, as if it read: "That assets in the hands of an executor for distribution among the collateral relations of or strangers to the decedent, shall be subject to a tax of five per cent."

§ 600. *Validity of state statutes under state constitutions.*

This court has no authority to revise the act of Pennsylvania upon any grounds of justice, policy or consistency to its own constitution. These are concluded by the decision of the public authorities of the state. The only inquiry for this court is, does the act violate the constitution of the United States or the treaties and laws made under it? The validity of the act, as affecting successions to open after its enactment, is not contested, nor is the authority of the state to levy taxes upon personal property belonging to its citizens, but situated beyond its limits, denied. But the complaint is, that the application of the act of 1826 by that of 1850 to a succession already in the course of settlement, and which had been appropriated by the last will of the decedent, involved an arbitrary change of the existing laws of inheritance to the extent of this tax, in the sequestration of that amount for the uses of the state. That the rights of the residuary legatees were vested at the death of the testator, and from that time those persons were non-residents and the property taxed was also beyond the state; and that the state has employed its power over the executor and the property within its borders to accomplish a measure of wrong and injustice. That the act contains the imposition of a forfeiture or penalty and is *ex post facto*. It is, in some sense, true that the rights of donees under a will are vested at the death of the testator, and that the acts of administration which follow are conservatory means directed by the state to ascertain those rights and to accomplish an effective translation of the dominion of the decedent to the objects of his bounty; and the legislation adopted with any other aim than this would justify criticism and perhaps censure.

§ 601. *The law of the domicile of the testator attaches to the property, and the rights of the donees are subordinate to the conditions prescribed by the legislature.*

But until the period for distribution arrives, the law of the decedent's domicile attaches to the property, and all other jurisdictions refer to the place of the domicile as that where the distribution should be made. The will of the testator is proven there, and his executor receives his authority to collect the property by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of the donee are subordinate to the conditions, formalities and administrative control prescribed by the state in the interests of its public order, and are only irrevocably established upon its abdication of this control at the period of distribution. If the state, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the constitution and laws of the United States to prevent it. *Ennis v. Smith*, 14 How., 400; *In re Ewin*, 1 Cr. & Jer., 151; 1 Barb. Ch. R., 180; 6 W. H. & G. Cy. R., 217; 21 Conn., 577. The act of 1850, in enlarging the operation of the act of 1826, and by extending the language of that act beyond its legal import, is retrospective in its form; but its practical agency is to subject to assessment property liable to taxation, to answer an existing exigency of the state, and to be collected in the course of future administration; and the language retrospective is of no impor-

tance except to describe the property to be included in the assessment. And, as the supreme court has well said, "in establishing its peculiar interpretation, it (the legislature) has only done indirectly what it was competent to do directly."

§ 602. *An ex post facto law is one relating to criminal matters; an act taxing decedents' estates is not such a law.*

But if the act of 1850 involved a change in the law of succession, and could be regarded as a civil regulation for the division of the estates of unmarried persons having no lineal heirs, and not as a fiscal imposition, this court could not pronounce it to be an *ex post facto* law within the tenth section of the first article of the constitution. The debates in the federal convention upon the constitution show that the terms "*ex post facto* laws" were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning. 3 Mad. Pap., 1399, 1450, 1579. This signification was adopted in this court shortly after its organization, in opinions carefully prepared, and has been repeatedly announced since that time. *Calder v. Bull*, 3 Dal., 386 (§§ 582-589, *supra*); *Fletcher v. Peck*, 6 Cranch, 87 (§§ 1805-12, *infra*); 8 Pet., 88 (§§ 1849-51, *infra*); 11 id., 421 (§§ 2038-82, *infra*). The same words are used in the constitutions of many of the states, and in the opinions of their courts and by writers upon public law, and are uniformly understood in this restricted sense. 3 N. H., 375; 5 Mon., 133; 9 Mass., 363; 6 Binn., 271; 4 Geor., 208. The plaintiff's argument concedes that his case is not within the scope of this clause of the constitution, unless its limits are enlarged to embrace civil as well as criminal cases, and he insists that the court should depart from the adjudications heretofore made upon this subject. But this cannot be done. There is no error in the record, and the judgment of the supreme court is affirmed.

#### BALTIMORE & SUSQUEHANNA RAILROAD COMPANY v. NESBIT.

(10 Howard, 395-402. 1850.)

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—This case comes before us from the district of Maryland, upon a writ of error to the court of Baltimore county, prosecuted under the twenty-fifth section of the judiciary act.

The facts from which the questions to be adjudged arise are the following: The legislature of Maryland, by a law of the 18th of February, 1828, incorporated the plaintiff in error by the name and style of the Baltimore & Susquehanna Railroad Company, for the purpose of constructing a railroad from the city of Baltimore to some point or points on the Susquehanna river. To enable this company to acquire such land, earth, timber or other materials as might be necessary for the construction and repairing of the road, the law above mentioned, by its fifteenth section, authorized the company to agree with the owners of the land and other materials wanted, for the purchase or use thereof; and in the event that the company could not agree with the owners, or that the owners were *femes covert* under age, insane or out of the county, this section provided that a justice of the peace of the county, upon application, should thereupon issue his warrant to the sheriff to summon a jury, who, in accordance with the directions contained in the same section of the statute, should value the damages which the owner or owners would sustain; and that the in-

quisition, signed and sealed by the jury, should be returned by the sheriff to the clerk or prothonotary of his county, to be filed in court, and that the same should be confirmed by said court at its next session, if no sufficient cause to the contrary be shown. The section further provides that "such valuation, when paid or tendered to the owner or owners of said property, or to his, her or their legal representatives, shall entitle the company to the estate and interest in the same thus valued, as fully as if it had been conveyed by the owner or owners of the same; and the valuation, if not received when tendered, may at any time thereafter be recovered from the company without costs by the said owner or owners, his, her or their legal representatives."

It appears that, under the authority of the statute above cited, an inquisition was, upon the application of the plaintiff in error, held by the sheriff of Baltimore county, on the 13th of December, 1836, upon the lands of the defendants in error as possessed by Alexander Nesbit in the character of trustee, and by Penelope D. Goodwin as *cestui que trust*, and the damages assessed by the jury upon that inquisition, for the land to be appropriated to the use of the plaintiff in error, were to the said Alexander Nesbit nothing, and to the said Penelope D. Goodwin \$500; that this inquisition having been returned to the court of Baltimore county, the following order in relation thereto was made on the 24th of April, 1837: "Ordered, that this inquisition be ratified and confirmed, no cause to the contrary having been shown." Subsequently to this order of confirmation, it appears that payment of the money assessed for damages to the lands of the defendants was not tendered by the plaintiff, nor any measure whatever in relation to this inquisition adopted by them, prior to the 18th day of April, 1844, on which last day the plaintiff, by its agent, tendered to the defendant, Penelope D. Goodwin, the sum of \$500, the principal of the damages assessed, with \$220.42 as interest for seven years, four months and five days on the amount of that assessment, making an aggregate of \$720.42. In the mean time, between the date of the inquisition and the tender just mentioned, namely, at their December session of 1841, the legislature of Maryland passed a statute, by which they directed "that the Baltimore county court should set aside the inquisition found for the Baltimore & Susquehanna Railroad Company, condemning the lands of Penelope D. Goodwin of said county, and that the said court direct an inquisition *de novo* to be taken, and that such proceedings be had as in cases where inquisitions in similar cases are set aside." In obedience to the statute last cited, the court of Baltimore county, upon the petition of the defendants in error, presented to them on the 26th of April, 1844, entered a rule upon the plaintiff in error to show cause, on the 11th day of May succeeding, why the inquisition should not be set aside, and an inquisition *de novo* directed as prayed for, and, after hearing counsel for and against the application, did, on the 13th of May, 1847, order and adjudge that the inquisition returned in that case be set aside, and that hereafter the court will, upon application of the petitioners, provide for the taking of an inquisition *de novo*, according to law.

The court of Baltimore county is admitted to be the highest in the state in which a decision upon this matter could be had, there being no appeal allowed from its judgment.

The plaintiff in error insists: 1. That, its charter being a contract between itself and the state, the act of 1841, having varied that contract without the assent of the company, was a law impairing the obligation of a contract, and therefore unconstitutional and void. 2. That the title to the land condemned



having vested by the confirmation of the inquisition, and the tender of the money anterior to the judgment of the Baltimore county court under the act of 1841, this act of the legislature is unconstitutional, because it devests vested rights, and in this way impairs the obligation of contracts.

§ 603. *There is no vested right to land condemned until payment of the damages.*

In considering the two propositions here laid down by the plaintiff in error, the first criticism to which they would seem to be obnoxious is this: that they assume, as the groundwork for the conclusions they present, that which remains to be demonstrated by a fair interpretation of the legislative action which it is sought to impugn. For instance, with respect to the first proposition, admitting the charter of the plaintiff to be a contract, the reality and character of any variation thereof by the legislature must be shown, before it can be brought within the inhibition of the constitution. So, too, with respect to the second charge, it must certainly be shown that there was a perfect investment of property in the plaintiff in error by contract with the legislature, and a subsequent arbitrary divestiture of that property by the latter body, in order to constitute their proceeding an act impairing the obligation of a contract.

The mode of proceeding prescribed by the fifteenth section of the charter of incorporation, for the acquiring of land and other materials for constructing the road, has been already stated. Let us now inquire by what acts to be performed by the company, and at what period of time, the investiture of such land and other property in them was to become complete,—what conditions or stipulations were imposed on the plaintiff in error as necessary to the completion of their contract. This will be indispensable in order to ascertain whether any variation of these conditions, amounting to an infraction of the contract, has been made by the Maryland legislature. After declaring that the inquisition, when returned, if no objection be made, shall be recorded, the fifteenth section provides that the payment or tender of the valuation to the owner of the land, etc., shall entitle the company to the estate and interest in the same as fully as if it had been conveyed by the owner or owners thereof. Thus it appears that it is the payment or tender of the value assessed by the inquisition which gives title to the company, and consequently, without such payment or tender, no title could, by the very terms of the law, have passed to them. Have the legislature by any subsequent arrangement abrogated or altered this condition, or the consequences which were to flow from its performance? From the period of the assessment to the 18th of April, 1844, this record discloses no evidence of any acceptance by the company of the proceedings under the inquisition, or such at least as could bind them. It can hardly be questioned, that, without acceptance by the acts and in the mode prescribed, the company were not bound; that if they had been dissatisfied with the estimate placed upon the land, or could have procured a more eligible site for the location of their road, they would have been at liberty, before such acceptance, wholly to renounce the inquisition. The proprietors of the land could have no authority to coerce the company into its adoption. This being the case, there could up to this point be no mutuality, and hence no contract, even in the constrained and compulsory character in which it was created and imposed upon the proprietors by the authority of the statute. This view of the matter seems to accord with the opinion of the chancellor of Maryland in his construction of this very charter, in the case of *Compton v. The Baltimore & Susquehanna Railroad Company*, where he uses this language: "In the taking

of an inquisition under this and similar statutory provisions, it must appear that the authority given has been pursued; and as, under a writ of *ad quod damnum*, there should be no unreasonable delay, much less could any fraudulent practice be allowed to pass without check or rebuke." 3 Bland's Chancery Reports, 391.

§ 604. — *and a law setting aside the inquisition before payment of the money is not one impairing the obligation of a contract or divesting vested rights.*

Five years after this inquisition, during all which interval this company neglects or omits the fulfilment of the essential condition on performance of which its title depended, the legislature again interposes; and it may be asked, in what respects this interposition amounted to an abrogation or variation of any contract which the legislative body itself, rather than the proprietors of the land, had been instrumental in making. We think this interposition in no respect impaired or contravened the contract alleged to have been previously existing; that it is perfectly consistent with all its conditions, and leaves the parties precisely as they stood from the passage of the charter, and at full liberty to insist upon whatever rights or interests that law had granted. It divested no rights of property, because, as we have shown, none had been vested. This intervention was simply the award of a new trial of the proceedings under the inquisition, which proceedings were of no avail as a judgment, after such new trial was allowed. This intervention, too, was the exercise of power by the legislature, supposed by that body to belong legitimately to itself; whether this authority was strictly legislative or judicial, according to the distribution of power in the state government, was a question rather for that government than for this court to determine.

§ 605. *Invasion by the legislature of the powers of the judiciary.*

What exact partition of powers, legislative, executive or judicial, the people of the several states, in their domestic organization, may, or should, apportion to the different departments of their respective governments, is an inquiry into which this court would enter with very great reluctance.

It might seem advantageous to some of the states that the judicial and legislative authorities or functions of the government should be blended in the same body; and that the legislature should in all cases exercise powers similar to those now vested in one branch of the British parliament, and as, in some specified instances, in one of the houses of our own national legislature. Should such an organization be adopted by a state, whatever might be thought of its wisdom, where beyond the body politic of the state would exist any power to impugn its legitimacy? But, in truth, no such inquiry regularly arises upon this record. The only questions presented for our consideration, the only questions we have authority to consider here, are: 1. Whether, under their charter of incorporation and the proceedings therein directed, and which have been had in pursuance of that charter, the plaintiff in error has, by contract with the state, been invested with certain perfect absolute rights of property? and 2. Whether such contract, if any such existed, has been impaired by subsequent legislation of the state, by a divestiture of those rights? To each of these questions we reply in the negative; because, as has already been shown, the conditions of the charter — conditions indispensable to the vesting of a title in the plaintiff in error — never were in due time and in good faith fulfilled; nor, until after the new trial had been ordered by the legislature, pretended to be complied with.

§ 606. *Calder v. Bull* considered.

If it were necessary to sustain by precedent the authority or practice of the state legislature in awarding a new trial, or in ordering a proceeding in the nature of an appeal, after litigation actually commenced, or even after judgment, and as to which provision for new trial or appeal had not been previously made, a very striking example from this court might be adduced in the case of *Calder v. Bull*, decided as long since as 1798, and reported in 3 Dal., 386 (§§ 582-599, *supra*). The facts of that case are thus stated by Chase, J., in delivering his opinion: "The legislature of Connecticut, on the 2d of May, 1795, passed a resolution or law which, for the reasons assigned, set aside a decree of the court of probate for Hartford, on the 21st of March, 1794, which decree disapproved of the will of Norman Morrison, made the 21st of August, 1779, and refused to record said will; and granted a new hearing by the said court of probate, with liberty of appeal therefrom within six months. A new hearing was had in virtue of this resolution or law, before the said court of probate, who, on the 27th of July, 1795, approved the will, and ordered it to be recorded. In August, 1795, appeal was had to the superior court of Hartford, who, at February term, 1796, affirmed the decree of the court of probate. Appeal was had to the supreme court of errors of Connecticut, who, in June, 1796, adjudged that there were no errors."

"The effect," says the same judge, "of the resolution or law of Connecticut above stated is to revise a decision of one of its inferior courts, and to direct a new hearing of the case by the same court of probate that passed the decree against the will of Norman Morrison. By the existing law of Connecticut, a right to recover certain property had vested in Calder and wife, in consequence of a decision of a court of justice, but in virtue of a subsequent resolution or law, and the new hearing thereof, and the decision in consequence, this right to recover certain property was divested, and the right to the property declared to be in Bull and wife, the appellees." Upon a full examination of this case, the court being of the opinion that the resolution or law of Connecticut awarding the new trial, with right of appeal, did not fall within the technical definition of an *ex post facto* law, and there being no contract impaired or affected by that resolution, they, by a unanimous decision, sustained the judgment founded upon that resolution.

§ 607. *The states have power to pass retroactive laws, which do not impair the obligations of contracts, and are not ex post facto laws.*

That there exists a general power in the state governments to enact retrospective or retroactive laws is a point too well settled to admit of question at this day. The only limit upon this power in the states by the federal constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts. Thus, in the case of *Watson v. Mercer*, 8 Pet., 110 (§§ 1849-51, *infra*), the court say: "It is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws. Now it has been solemnly settled by this court that the phrase *ex post facto* is not applicable to civil laws, but to penal and criminal laws." For this position is cited the case of *Calder v. Bull*, already mentioned; of *Fletcher v. Peck*, 6 Cranch, 138

(§§ 1805–12, *infra*); *Ogden v. Saunders*, 12 Wheat., 266 (§§ 1940–2003, *infra*); and *Satterlee v. Matthewson*, 2 Pet., 380 (§§ 1630–35, *infra*). Now, it must be apparent that the act of the Maryland legislature of December, 1841, simply ordering a new trial of the inquisition, does not fall within any definition given of an *ex post facto* law, and is not, therefore, assailable on that account. We have already shown that this law impaired the obligation of no contract, because, at the time of its passage, and in virtue of any proceeding had under the charter of the company, no contract between the company on the one hand, and the state or the proprietors of the land on the other, in reality existed. We therefore adjudge the act of the legislature of Maryland of December, 1841, and the proceedings of the court of Baltimore county, had in pursuance thereof, to be constitutional and valid, and order that the judgment of the said court be, and the same is hereby, affirmed.

## CUMMINGS v. STATE OF MISSOURI

(4 Wallace, 277–333. 1866.)

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This case comes before us on a writ of error to the supreme court of Missouri, and involves a consideration of the test oath imposed by the constitution of that state. The plaintiff in error is a priest of the Roman Catholic Church, and was indicted and convicted in one of the circuit courts of the state of the crime of teaching and preaching as a priest and minister of that religious denomination without having first taken the oath, and was sentenced to pay a fine of \$500, and to be committed to jail until the same was paid. On appeal to the supreme court of the state, the judgment was affirmed.

The oath prescribed by the constitution, divided into its separable parts, embraces more than thirty distinct affirmations or tests. Some of the acts against which it is directed constitute offenses of the highest grade, to which, upon conviction, heavy penalties are attached. Some of the acts have never been classed as offenses in the laws of any state, and some of the acts, under many circumstances, would not even be blameworthy. It requires the affiant to deny not only that he has ever “been in armed hostility to the United States, or to the lawful authorities thereof,” but, among other things, that he has ever, “by act or word,” manifested his adherence to the cause of the enemies of the United States, foreign or domestic, or his *desire* for their triumph over the arms of the United States, or his *sympathy* with those engaged in rebellion, or has ever *harbored* or *aided any person* engaged in guerrilla warfare against the loyal inhabitants of the United States, or has ever *entered* or *left* the state for the purpose of avoiding enrolment or draft in the military service of the United States; or, to escape the performance of duty in the militia of the United States, has ever indicated, *in any terms*, his *disaffection* to the government of the United States in its contest with the rebellion. Every person who is unable to take this oath is declared incapable of holding, in the state, “any office of honor, trust or profit under its authority, or of being an officer, councilman, director or trustee, or other manager, of any corporation, public or private, now existing or hereafter established by its authority, or of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society or congregation.”

And every person holding, at the time the constitution takes effect, any of the offices, trusts or positions mentioned is required, within sixty days thereafter, to take the oath; and, if he fail to comply with this requirement, it is declared that his office, trust or position shall *ipso facto* become vacant. No person, after the expiration of the sixty days, is permitted, without taking the oath, "to practice as an attorney or counselor-at-law, nor after that period can any person be competent, as a bishop, priest, deacon, minister, elder or other clergyman of any religious persuasion, sect or denomination, to teach, or preach, or solemnize marriages." Fine and imprisonment are prescribed as a punishment for holding or exercising any of "the offices, positions, trusts, professions or functions" specified, without having taken the oath; and false swearing or affirmation in taking it is declared to be perjury, punishable by imprisonment in the penitentiary.

The oath thus required is, for its severity, without any precedent that we can discover. In the first place, it is retrospective; it embraces all the past from this day; and, if taken years hence, it will also cover all the intervening period. In its retrospective feature we believe it is peculiar to this country. In England and France there have been test oaths, but they were always limited to an affirmation of present belief or present disposition towards the government, and were never exacted with reference to particular instances of past misconduct. In the second place, the oath is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires and sympathies also. And, in the third place, it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity or affection or relationship. If one has ever expressed sympathy with any who were drawn into the rebellion, even if the recipients of that sympathy were connected by the closest ties of blood, he is as unable to subscribe to the oath as the most active and the most cruel of the rebels, and is equally debarred from the offices of honor or trust, and the positions and employments specified. But, as it was observed by the learned counsel who appeared on behalf of the state of Missouri, this court cannot decide the case upon the justice or hardship of these provisions. Its duty is to determine whether they are in conflict with the constitution of the United States. On behalf of Missouri, it is urged that they only prescribe a qualification for holding certain offices and practicing certain callings, and that it is, therefore, within the power of the state to adopt them. On the other hand, it is contended that they are in conflict with that clause of the constitution which forbids any state to pass a bill of attainder or an *ex post facto* law.

§ 608. *The states retain all the attributes of sovereignty except those delegated to the federal government.*

We admit the propositions of the counsel of Missouri, that the states which existed previous to the adoption of the federal constitution possessed originally all the attributes of sovereignty; that they still retain those attributes, except as they have been surrendered by the formation of the constitution, and the amendments thereto; that the new states, upon their admission into the Union, became invested with equal rights, and were thereafter subject only to similar restrictions, and that among the rights reserved to the states is the right of each state to determine the qualifications for office, and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction.

§ 609. *States cannot inflict punishment for an act not punishable when committed.*

These are general propositions and involve principles of the highest moment. But it by no means follows that, under the form of creating a qualification or attaching a condition, the states can in effect inflict a punishment for a past act which was not punishable at the time it was committed. The question is not as to the existence of the power of the state over matters of internal police, but whether that power has been made in the present case an instrument for the infliction of punishment against the inhibition of the constitution.

§ 610. *Infliction of punishment by prescribing qualifications for office.*

Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean "any natural endowment or any acquirement which fits a person for a place, office or employment, or enables him to sustain any character, with success." It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the state of Missouri to avoid enrolment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind, or the expression of words of sympathy with some of the persons drawn into the rebellion, constitute any evidence of the unfitness of the attorney or counselor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties who had committed them of some of the rights and privileges of the citizen.

§ 611. *Disabilities to be regarded as penalties; the terms "life," "liberty" and "property" considered.*

The disabilities created by the constitution of Missouri must be regarded as penalties — they constitute punishment. We do not agree with the counsel of Missouri that "to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all." The learned counsel does not use these terms — life, liberty and property — as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may

be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator or guardian, may also be, and often has been, imposed as punishment. By statute 9 and 10 William III., ch. 32, if any person educated in or having made a profession of the Christian religion, did, "by writing, printing, teaching, or advised speaking," deny the truth of the religion, or the divine authority of the Scriptures, he was for the first offense rendered incapable to hold any office or place of trust; and for the second he was rendered incapable of bringing any action, being guardian, executor, legatee or purchaser of lands, besides being subjected to three years' imprisonment without bail. 4 Black., 44.

By statute 1 George I., ch. 13, contempts against the king's title, arising from refusing or neglecting to take certain prescribed oaths, and yet acting in an office or place of trust for which they were required, were punished by incapacity to hold any public office; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament; and the offender was also subject to a forfeiture of five hundred pounds to any one who would sue for the same. Id., 124. "Some punishments," says Blackstone, "consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors and the like." Id., 377. In France deprivation or suspension of civil rights, or of some of them, and among these of the right of voting, of eligibility to office, of taking part in family councils, of being guardian or trustee, of bearing arms, and of teaching or being employed in a school or seminary of learning, are punishments prescribed by her code.

§ 612. *Any deprivation of the right to pursue a lawful calling for past acts is punishment.*

The theory upon which our political institutions rest is, that all men have certain inalienable rights — that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined. Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty or property, but also embracing deprivation or suspension of political or civil rights, and the disabilities prescribed by the provisions of the Missouri constitution being in effect punishment, we proceed to consider whether there is any inhibition in the constitution of the United States against their enforcement.

§ 613. *The federal constitution was intended to guard against acts engendered by passion and excitement.*

The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendancy in that state during the recent rebellion between the friends and the enemies of the Union and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present constitution was framed, although it was not adopted by the people

until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the convention held its deliberations. It was against the excited action of the states, under such influences as these, that the framers of the federal constitution intended to guard. In *Fletcher v. Peck*, 6 Cranch, 137 (§§ 1805–12, *infra*), Mr. Chief Justice Marshall, speaking of such action, uses this language: “Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.”

§ 614. *Bills of attainder, and of pains and penalties, defined.*

“‘No state shall pass any bill of attainder, *ex post facto* law or law impairing the obligation of contracts.’” A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.

§ 615. *The history of bills of attainder.*

“Bills of this sort,” says Mr. Justice Story, “have been most usually passed in England in times of rebellion, or gross subserviency to the crown, or of violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties and to trample upon the rights and liberties of others.” Commentaries, § 1344. These bills are generally directed against individuals by name, but they may be directed against a whole class. The bill against the Earl of Kildare and others, passed in the reign of Henry VIII. (28 Henry VIII., ch. 18; 3 Stats. of the Realm, 694), enacted that “all such persons which be or heretofore have been comforters, abettors, partakers, confederates or adherents unto the said” late earl, and certain other parties, who were named, “in his or their false and traitorous acts and purposes, shall in likewise stand and be attainted, adjudged and convicted of high treason;” and that “the same attainder, judgment and conviction against the said comforters, abettors, partakers, confederates and adherents shall be as strong and effectual in the law against them, and every of them, as though they and every of them had been specially, singularly and particularly named by their proper names and surnames in the said act.” These bills may inflict punishment absolutely or may inflict it conditionally. The bill against the Earl of Clarendon, passed in the reign of Charles the Second, enacted that the earl should suffer perpetual exile, and be forever banished from the realm; and that if he returned, or was found in England or in any other of the king’s dominions, after the 1st of February, 1667, he should suffer the pains and



penalties of treason; with the proviso, however, that if he surrendered himself before the said 1st day of February for trial, the penalties and disabilities declared should be void and of no effect. Printed in 6 Howell's State Trials, p. 391. "A British act of parliament," to cite the language of the supreme court of Kentucky, "might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted, felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury." *Gaines v. Buford*, 1 Dana, 510.

If the clauses of the second article of the constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having been in armed hostility to the United States, or of having entered that state to avoid being enrolled or drafted into the military service of the United States, and, therefore, should be deprived of the right to preach as a priest of the Catholic church, or to teach in any institution of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the federal constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the state of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the federal constitution. In all these cases there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.

§ 616. *Test oath, Missouri constitution, 1865, is a bill of pains and penalties, and an ex post facto law, and is void.*

The results which would follow from clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

§ 617. *Ex post facto laws defined.*

We proceed to consider the second clause of what Mr. Chief Justice Marshall terms a bill of rights for the people of each state—the clause which inhibits

the passage of an *ex post facto* law. By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then required.

In *Fletcher v. Peck*, Mr. Chief Justice Marshall defined an *ex post facto* law to be one "which renders an act punishable in a manner in which it was not punishable when it was committed." "Such a law," said that eminent judge, "may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing for public use the estate of an individual, in the form of a law annulling the title by which he holds the estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?" The act to which reference is here made was one passed by the state of Georgia, rescinding a previous act, under which lands had been granted. The rescinding act, annulling the title of the grantees, did not, in terms, define any crimes, or inflict any punishment, or direct any judicial proceedings; yet, inasmuch as the legislature was forbidden from passing any law by which a man's estate could be seized for a crime which was not declared such by some previous law rendering him liable to that punishment, the chief justice was of opinion that the rescinding act had the effect of an *ex post facto* law, and was within the constitutional prohibition.

§ 618. *Nature and effect of the constitutional provisions under consideration.*

The clauses in the Missouri constitution which are the subject of consideration do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same result upon the parties against whom they are directed as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. They would have no meaning in the constitution were not such the fact. They are aimed at past acts, and not future acts. They were intended especially to operate upon parties who, in some form or manner, by action or words, directly or indirectly, had aided or countenanced the rebellion, or sympathized with parties engaged in the rebellion, or had endeavored to escape the proper responsibilities and duties of a citizen in time of war; and they were intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition,

and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else.

Now some of the acts to which the expurgatory oath is directed were not offenses at the time they were committed. It was no offense against any law to enter or leave the state of Missouri for the purpose of avoiding enrolment or draft in the military service of the United States, however much the evasion of such service might be the subject of moral censure. Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an *ex post facto* law — “they impose a punishment for an act not punishable at the time it was committed.”

Some of the acts at which the oath is directed constituted high offenses at the time they were committed, to which, upon conviction, fine and imprisonment, or other heavy penalties, were attached. The clauses which provide a further penalty for these acts are also within the definition of an *ex post facto* law — “they impose additional punishment to that prescribed when the act was committed.” And this is not all. The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way — by an inquisition, in the form of an expurgatory oath, into the consciences of the parties. The objectionable character of these clauses will be more apparent if we put them into the ordinary form of a legislative act. Thus if, instead of the general provisions in the constitution, the convention had provided as follows: Be it enacted, that all persons who have been in armed hostility to the United States shall, upon conviction thereof, not only be punished as the laws provided at the time the offenses charged were committed, but shall also be thereafter rendered incapable of holding any of the offices, trusts and positions, and of exercising any of the pursuits mentioned in the second article of the constitution of Missouri,—no one would have any doubt of the nature of the enactment. It would be an *ex post facto* law, and void; for it would add a new punishment for an old offense. So, too, if the convention had passed an enactment of a similar kind with reference to those acts which do not constitute offenses. Thus, had it provided as follows: Be it enacted, that all persons who have heretofore, at any time, entered or left the state of Missouri, with intent to avoid enrolment or draft in the military service of the United States, shall, upon conviction thereof, be forever rendered incapable of holding any office of honor, trust or profit in the state, or of teaching in any seminary of learning, or of preaching as a minister of the gospel of any denomination, or of exercising any of the professions or pursuits mentioned in the second article of the constitution,—there would be no question of the character of the enactment. It would be an *ex post facto* law, because it would impose a punishment for an act not punishable at the time it was committed.

The provisions of the constitution of Missouri accomplish precisely what enactments like those supposed would have accomplished. They impose the same penalty, without the formality of a judicial trial and conviction; for the parties embraced by the supposed enactments would be incapable of taking the oath prescribed; to them its requirement would be an impossible condition. Now, as the state, had she attempted the course supposed, would have failed, it must follow that any other mode producing the same result must equally

fail. The provision of the federal constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the state is exerted. If this were not so, if that which cannot be accomplished by means **looking directly to the end can be accomplished by indirect means**, the inhibition may be evaded at pleasure. No kind of oppression can be named, against which the framers of the constitution intended to guard, which may not be effected. Take the case supposed by counsel — that of a man tried for treason and acquitted, or, if convicted, pardoned — the legislature may nevertheless enact that, if the person thus acquitted or pardoned does not take an oath that he never has committed the acts charged against him, he shall not be permitted to hold any office of honor or trust or profit, or pursue any avocation in the state. Take the case before us: — the constitution of Missouri, as we have seen, excludes, on failure to take the oath prescribed by it, a large class of persons within her borders from numerous positions and pursuits; it would have been equally within the power of the state to have extended the exclusion so as to deprive the parties, who are unable to take the oath, from any avocation whatever in the state. Take still another case: — suppose that, in the progress of events, persons now in the minority in the state should obtain the ascendancy, and secure the control of the government; nothing could prevent, if the constitutional prohibition can be evaded, the enactment of a provision requiring every person, as a condition of holding any position of honor or trust, or of pursuing any avocation in the state, to take an oath that he had never advocated or advised or supported the imposition of the present expurgatory oath. Under this form of legislation the most flagrant invasion of private rights, in periods of excitement, may be enacted, and individuals, and even whole classes, may be deprived of political and civil rights.

A question arose in New York soon after the treaty of peace of 1783, upon a statute of that state, which involved a discussion of the nature and character of these expurgatory oaths, when used as a means of inflicting punishment for past conduct. The subject was regarded as so important, and the requirement of the oath such a violation of the fundamental principles of civil liberty and the rights of the citizen, that it engaged the attention of eminent lawyers and distinguished statesmen of the time, and among others of Alexander Hamilton. We will cite some passages of a paper left by him on the subject, in which, with his characteristic fullness and ability, he examines the oath, and demonstrates that it is not only a mode of inflicting punishment, but a mode in violation of all the constitutional guaranties, secured by the Revolution, of the rights and liberties of the people. "If we examine it" (the measure requiring the oath), said this great lawyer, "with an unprejudiced eye, we must acknowledge, not only that it was an invasion of the treaty, but a subversion of one great principle of social security, to wit, that every man shall be presumed innocent until he is proved guilty. This was to invert the order of things; and instead of obliging the state to prove the guilt, in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty. It was to excite scruples in the honest and conscientious, and to hold out a bribe to perjury. . . . It was a mode of inquiry who had committed any of those crimes to which the penalty of disqualification was annexed, with this aggravation, that it deprived the citizen of the benefit of that advantage which he would have enjoyed by leaving, as in all other cases, the burden of the proof upon the prosecutor.

"To place this matter in a still clearer light, let it be supposed that, instead

of the mode of indictment and trial by jury, the legislature was to declare that every citizen who did not swear he had never adhered to the king of Great Britain should incur all the penalties which our treason laws prescribe. Would this not be a palpable evasion of the treaty, and a direct infringement of the constitution? The principle is the same in both cases, with only this difference in the consequences—that in the instance already acted upon the citizen forfeits a part of his rights; in the one supposed he would forfeit the whole. The degree of punishment is all that distinguishes the cases. In either, justly considered, it is substituting a new and arbitrary mode of prosecution to that ancient and highly esteemed one recognized by the laws and constitution of the state. I mean the trial by jury.

“Let us not forget that the constitution declares that trial by jury, in all cases in which it has been formerly used, should remain inviolate forever, and that the legislature should at no time erect any new jurisdiction which should not proceed according to the course of the common law. Nothing can be more repugnant to the true genius of the common law than such an inquisition as has been mentioned into the consciences of men. . . . If any oath with retrospect to past conduct were to be made the condition on which individuals, who have resided within the British lines, should hold their estates, we should immediately see that this proceeding would be tyrannical, and a violation of the treaty; and yet, when the same mode is employed to divest that right which ought to be deemed still more sacred, many of us are so infatuated as to overlook the mischief.

“To say that the persons who will be affected by it have previously forfeited that right, and that, therefore, nothing is taken away from them, is a begging of the question. How do we know who are the persons in this situation? If it be answered, this is the mode taken to ascertain it—the objection returns—’tis an improper mode; because it puts the most essential interests of the citizen upon a worse footing than we should be willing to tolerate where inferior interests were concerned; and because, to elude the treaty, it substitutes for the established and legal mode of investigating crimes and inflicting forfeitures, one that is unknown to the constitution, and repugnant to the genius of our law.” Similar views have frequently been expressed by the judiciary in cases involving analogous questions. They are presented with great force in *In re Dorsey*, 7 Port., 294; but we do not deem it necessary to pursue the subject further.

The judgment of the supreme court of Missouri must be reversed, and the cause remanded, with directions to enter a judgment reversing the judgment of the circuit court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without day; and it is so ordered.

The CHIEF JUSTICE and JUSTICES SWAYNE, DAVIS and MILLER dissented. See the dissenting opinion published with *Ex parte Garland*.

#### EX PARTE GARLAND.

(4 Wallace, 333-399. 1866.)

#### Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—On the 2d of July, 1862, congress passed an act prescribing an oath to be taken by every person elected or appointed to any office of honor or profit under the government of the United States, either in the

civil, military or naval departments of the public service, except the president, before entering upon the duties of his office, and before being entitled to its salary, or other emoluments. On the 24th of January, 1865, congress, by a supplementary act, extended its provisions so as to embrace attorneys and counselors of the courts of the United States. This latter act provides that after its passage no person shall be admitted as an attorney and counselor to the bar of the supreme court, and, after the 4th of March, 1865, to the bar of any circuit or district court of the United States, or of the court of claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed by the act of July 2, 1862. It also provides that the oath shall be preserved among the files of the court; and if any person take it falsely he shall be guilty of perjury, and, upon conviction, shall be subject to the pains and penalties of that offense.

At the December term, 1860, the petitioner was admitted as an attorney and counselor of this court, and took and subscribed the oath then required. By the second rule, as it then existed, it was only requisite to the admission of attorneys and counselors of this court, that they should have been such officers for the three previous years in the highest courts of the states to which they respectively belonged, and that their private and professional character should appear to be fair. In March, 1865, this rule was changed by the addition of a clause requiring the administration of the oath, in conformity with the act of congress.

In May, 1861, the state of Arkansas, of which the petitioner was a citizen, passed an ordinance of secession, which purported to withdraw the state from the Union, and afterwards, in the same year, by another ordinance, attached herself to the so-called Confederate States, and by act of the congress of that confederacy was received as one of its members. The petitioner followed the state, and was one of her representatives — first in the lower house, and afterwards in the senate, of the congress of that confederacy, and was a member of the senate at the time of the surrender of the Confederate forces to the armies of the United States.

§ 619. *Objections to the act of January 24, 1865.*

In July, 1865, he received from the president of the United States a full pardon for all offenses committed by his participation, direct or implied, in the rebellion. He now produces his pardon, and asks permission to continue to practice as an attorney and counselor of the court without taking the oath required by the act of January 24, 1865, and the rule of the court, which he is unable to take, by reason of the offices he held under the Confederate government. He rests his application principally upon two grounds: 1st. That the act of January 24, 1865, so far as it affects his *status* in the court, is unconstitutional and void; and 2d. That, if the act be constitutional, he is released from compliance with its provisions by the pardon of the president.

The oath prescribed by the act is as follows: 1st. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof; 2d. That he has not voluntarily given aid, countenance, counsel or encouragement to persons engaged in armed hostility thereto; 3d. That he has never sought, accepted or attempted to exercise the functions of any office whatsoever, under any authority, or pretended authority, in hostility to the United States; 4th. That he has not yielded a voluntary support to any pretended government, authority, power or constitution, within the United States, hostile or

inimical thereto; and 5th. That he will support and defend the constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same.

§ 620. *The act construed.*

This last clause is promissory only, and requires no consideration. The questions presented for our determination arise from the other clauses. These all relate to past acts. Some of these acts constituted, when they were committed, offenses against the criminal laws of the country; others may, or may not, have been offenses according to the circumstances under which they were committed, and the motives of the parties. The first clause covers one form of the crime of treason, and the deponent must declare that he has not been guilty of this crime, not only during the war of the rebellion, but during any period of his life since he has been a citizen. The second clause goes beyond the limits of treason, and embraces not only the giving of aid and encouragement of a treasonable nature to a public enemy, but also the giving of assistance of any kind to persons engaged in armed hostility to the United States. The third clause applies to the seeking, acceptance or exercise not only of offices created for the purpose of more effectually carrying on hostilities, but also of any of those offices which are required in every community, whether in peace or war, for the administration of justice and the preservation of order. The fourth clause not only includes those who gave a cordial and active support to the hostile government, but also those who yielded a reluctant obedience to the existing order, established without their co-operation. The statute is directed against the parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and, instead of lessening, increases its objectionable character.

§ 621. *An act excluding an attorney from practice on account of past offenses is a bill of attainder, and ex post facto.*

All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included. In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the constitution against the passage of an *ex post facto* law. In the case of Cummings against The State of Missouri, just decided, we have had occasion to consider at length the meaning of a bill of attainder and of an *ex post facto* law in the clause of the constitution forbidding their passage by the states, and it is unnecessary to repeat here what we there said. A like prohibition is contained in the constitution against enactments of this kind by congress; and the argument presented in that case against certain clauses of the constitution of Missouri is equally applicable to the act of congress under consideration in this case.

§ 622. *An attorney is an officer of the court and not of the United States. Courts alone can judge of his right to practice.*

The profession of an attorney and counselor is not like an office created by an act of congress, which depends for its continuance, its powers and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the constitution. Attorneys and counselors are not officers of the United States; they are not elected or appointed in the manner prescribed by the constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such officers in the highest court of the states to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counselors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. *Ex parte Heyfron*, 7 How. (Miss.), 127; *Fletcher v. Daingerfield*, 20 Cal., 430. Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases. It was so held by the court of appeals of New York in the matter of the application of Cooper for admission. 22 N. Y., 81. "Attorneys and counselors," said that court, "are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may, with propriety, be intrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions."

In *Ex parte Secombe*, 19 How., 9, a *mandamus* to the supreme court of the territory of Minnesota to vacate an order removing an attorney and counselor was denied by this court, on the ground that the removal was a judicial act. "We are not aware of any case," said the court, "where a *mandamus* was issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature a judicial act and within the scope of its jurisdiction and discretion." And in the same case the court observed that "it has been well settled by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed."

§ 623. *An attorney can be deprived of the right to appear for suitors only by the judgment of the court.*

The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be



deprived by the judgment of the court, for moral or professional delinquency. The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question in this case is not as to the power of congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the constitution. That this result cannot be effected indirectly by a state under the form of creating qualifications we have held in the case of *Cummings v. State of Missouri*, 4 Wall., 277 (§§ 608-618, *supra*); and the reasoning by which that conclusion was reached applies equally to similar action on the part of congress.

§ 624. *Power of the president to pardon is unlimited.*

This view is strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the president. The constitution provides that the president "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Article II, § 2. The power thus conferred is unlimited, with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the president is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

§ 625. *Effects of a pardon.*

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

§ 626. *Limitations of the operation of a pardon.*

There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others, in consequence of the conviction and judgment. 4 Bl. Com., 402; 6 Bacon's Abr., tit. Pardon; Hawkins, book 2, c. 37, §§ 34 and 54.

The pardon produced by the petitioner is a full pardon "for all offenses by him committed, arising from participation, direct or implied, in the rebellion," and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offense of treason committed by his participation in the rebellion. So far as that offense is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offense, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offense notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offense, the pardon may be avoided, and that accomplished indirectly which

cannot be reached by direct legislation. It is not within the constitutional power of congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the act of January 24, 1865, could not be exacted, even if that act were not subject to any other objection than the one thus stated.

It follows, from the views expressed, that the prayer of the petitioner must be granted. The case of R. H. Marr is similar, in its main features, to that of the petitioner, and his petition must also be granted. And the amendment of the second rule of the court, which requires the oath prescribed by the act of January 24, 1865, to be taken by attorneys and counselors, having been unadvisedly adopted, must be rescinded, and it is so ordered.

Dissenting opinion by MR. JUSTICE MILLER, the CHIEF JUSTICE, and JUSTICES SWAYNE and DAVIS, concurring.

I dissent from the opinions of the court just announced. (a)

It may be hoped that the exceptional circumstances which give present importance to these cases will soon pass away, and that those who make the laws, both state and national, will find in the conduct of the persons affected by the legislation just declared to be void, sufficient reason to repeal or essentially modify it. For the speedy return of that better spirit which shall leave us no cause for such laws all good men look with anxiety, and with a hope, I trust, not altogether unfounded. But the question involved, relating as it does to the right of the legislatures of the nation and of the state to exclude from offices and places of high public trust, the administration of whose functions are essential to the very existence of the government, those among its own citizens who have been engaged in a recent effort to destroy that government by force, can never cease to be one of profound interest.

It is at all times the exercise of an extremely delicate power for this court to declare that the congress of the nation or the legislative body of a state has assumed an authority not belonging to it, and, by violating the constitution, has rendered void its attempt at legislation. In the case of an act of congress which expresses the sense of the members of a co-ordinate department of the government, as much bound by their oath of office as we are to respect that constitution, and whose duty it is, as much as it is ours, to be careful that no statute is passed in violation of it, the incompatibility of the act with the constitution should be so clear as to leave little reason for doubt, before we pronounce it to be invalid. Unable to see this incompatibility, either in the act of congress or in the provision of the constitution of Missouri upon which this court has just passed, but entertaining a strong conviction that both were within the competency of the bodies which enacted them, it seems to me an occasion which demands that my dissent from the judgment of the court, and the reasons for that dissent, should be placed on its records. In the comments which I have to make upon these cases, I shall speak of principles equally applicable to both, although I shall refer more directly to that which involves the oath required of attorneys by the act of congress, reserving for the close some remarks more especially applicable to the oath prescribed by the constitution of the state of Missouri.

§ 627. *Powers of congress.*

The constitution of the United States makes ample provision for the establishment of courts of justice to administer her laws, and to protect and enforce

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(a) The opinion in the preceding case of *Cummings v. State of Missouri* is included in the dissent.

the rights of her citizens. Article III, section 1, of that instrument, says that "the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the congress may, from time to time, ordain and establish." Section 8 of article I closes its enumeration of the powers conferred on congress by the broad declaration that it shall have authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department thereof." Under these provisions, congress has ordained and established circuit courts, district courts, and territorial courts, and has, by various statutes, fixed the number of the judges of the supreme court. It has limited and defined the jurisdiction of all these, and determined the salaries of the judges who hold them. It has provided for their necessary officers, as marshals, clerks, prosecuting attorneys, bailiffs, commissioners and jurors. And by the act of 1789, commonly called the judiciary act, passed by the first congress assembled under the constitution, it is among other things enacted, that "in all the courts of the United States the parties may plead and manage their causes personally, or by the assistance of such counsel or attorneys-at-law as by the rules of the said courts, respectively, shall be permitted to manage and conduct causes therein." It is believed that no civilized nation of modern times has been without a class of men intimately connected with the courts, and with the administration of justice, called variously attorneys, counselors, solicitors, proctors and other terms of similar import. The enactment which we have just cited recognizes this body of men, and their utility in the judicial system of the United States, and imposes upon the courts the duty of providing rules by which persons entitled to become members of this class may be permitted to exercise the privilege of managing and conducting causes in these courts. They are as essential to the successful working of the courts as the clerks, sheriffs and marshals, and perhaps as the judges themselves, since no instance is known of a court of law without a bar.

§ 628. *The right to practice law in the courts as a profession is a privilege granted by the law, under such limitations as the law-making power may prescribe.*

The right to practice law in the courts as a profession is a privilege granted by the law, under such limitations or conditions in each state or government as the law-making power may prescribe. It is a privilege, and not an absolute right. The distinction may be illustrated by the difference between the right of a party to a suit in court to defend his own cause, and the right of another to appear and defend for him. The one, like the right to life, liberty and the pursuit of happiness, is inalienable. The other is the privilege conferred by law on a person who complies with the prescribed conditions. Every state in the Union, and every civilized government, has laws by which the right to practice in its courts may be granted, and makes that right to depend on the good moral character and professional skill of the party on whom the privilege is conferred. This is not only true in reference to the first grant of license to practice law, but the continuance of the right is made by these laws to depend upon the continued possession of those qualities. Attorneys are often deprived of this right, upon evidence of bad moral character or specific acts of immorality or dishonesty, which show that they no longer possess the requisite qualifications. All this is done by law, either statutory or common; and whether the one or the other, equally the expression of legislative will, for the common law

exists in this country only as it is adopted or permitted by the legislatures, or by constitutions. No reason is perceived why this body of men, in their important relations to the courts of the nation, are not subject to the action of congress to the same extent that they are under legislative control in the states, or in any other government; and to the same extent that the judges, clerks, marshals and other officers of the court are subject to congressional legislation. Having the power to establish the courts, to provide for and regulate the practice in those courts, to create their officers and prescribe their functions, can it be doubted that congress has the full right to prescribe terms for the admission, rejection and expulsion of attorneys, and for requiring of them an oath, to show whether they have the proper qualifications for the discharge of their duties?

§ 629. *The act of 1865 is nothing more than a statute which requires of all lawyers who propose to practice in the federal courts to swear that they have not been guilty of treason in the past, and will bear faithful allegiance in the future.*

The act which has just been declared to be unconstitutional is nothing more than a statute which requires of all lawyers who propose to practice in the national courts that they shall take the same oath which is exacted of every officer of the government, civil or military. This oath has two aspects: one which looks to the past conduct of the party, and one to his future conduct; but both have reference to his disposition to support or to overturn the government in whose functions he proposes to take part. In substance, he is required to swear that he has not been guilty of treason to that government in the past, and that he will bear faithful allegiance to it in the future. That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me to be too clear for argument. The history of the Anglo-Saxon race shows that, for ages past, the members of the legal profession have been powerful for good or evil to the government. They are, by the nature of their duties, the moulders of public sentiment on questions of government, and are every day engaged in aiding in the construction and enforcement of the laws. From among their numbers are necessarily selected the judges who expound the laws and the constitution. To suffer treasonable sentiments to spread here unchecked is to permit the stream on which the life of the nation depends to be poisoned at its source. In illustration of this truth, I venture to affirm that if all the members of the legal profession in the states lately in insurrection had possessed the qualification of a loyal and faithful allegiance to the government, we should have been spared the horrors of that rebellion. If, then, this qualification be so essential in a lawyer, it cannot be denied that the statute under consideration was eminently calculated to secure that result. The majority of this court, however, do not base their decisions on the mere absence of authority in congress, and in the states, to enact the laws which are the subject of consideration, but insist that the constitution of the United States forbids, in prohibitory terms, the passage of such laws, both to the congress and to the states. The provisions of that instrument, relied on to sustain this doctrine, are those which forbid congress and the states, respectively, from passing bills of attainder and *ex post facto* laws. It is said that the act of congress and the provision of the constitution of the state of Missouri under review are in conflict with both these prohibitions, and are therefore void.

§ 630. *The history of bills of attainder.*

I will examine this proposition in reference to these two clauses of the constitution, in the order in which they occur in that instrument. 1. In regard to bills of attainder, I am not aware of any judicial decision by a court of federal jurisdiction which undertakes to give a definition of that term. We are therefore compelled to recur to the bills of attainder passed by the English parliament, that we may learn so much of their peculiar characteristics as will enable us to arrive at a sound conclusion as to what was intended to be prohibited by the constitution. The word attainder is derived by Sir Thomas Tomlins, in his law dictionary, from the words *attincta* and *attinctura*, and is defined to be "the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence of the common law, on the pronouncing the sentence of death." The effect of this corruption of the blood was, that the party attainted lost all inheritable quality, and could neither receive nor transmit any property or other rights by inheritance. This attainder or corruption of blood, as a consequence of judicial sentence of death, continued to be the law of England, in all cases of treason, to the time that our constitution was framed, and, for aught that is known to me, is the law of that country, on condemnation for treason, at this day.

§ 631. *A bill of attainder is an act declaring certain persons attainted and their blood corrupted so that it loses all its inheritable quality.*

Bills of attainder, therefore, or acts of attainder, as they were called after they were passed into statutes, were laws which declared certain persons *attainted*, and their blood corrupted so that it had lost all heritable quality. Whether it declared other punishment or not, it was an act of attainder if it declared this. This also seems to have been the main feature at which the authors of the constitution were directing their prohibition; for after having, in article I, prohibited the passage of bills of attainder—in section 9, to congress, and in section 10, to the states—there still remained to the judiciary the power of declaring attainders. Therefore, to still further guard against this odious form of punishment, it is provided, in section 3 of article III, concerning the judiciary, that while congress shall have power to declare the punishment of treason, no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. This, however, while it was the chief, was not the only, peculiarity of bills of attainder which was intended to be included within the constitutional restriction. Upon an attentive examination of the distinctive features of this kind of legislation, I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned, which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government:

1. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial.
2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.
3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence, or that of his counsel, and no recognized rule of evidence governed the inquiry. See Story on the Constitution, § 1344.

It is no cause for wonder that men who had just passed successfully through a desperate struggle in behalf of civil liberty should feel a detestation for legislation of which these were the prominent features. The framers of our polit-

ical system had a full appreciation of the necessity of keeping separate and distinct the primary departments of the government. Mr. Hamilton, in the seventy-eighth number of the *Federalist*, says that he agrees with the maxim of Montesquieu, that "there is no liberty if the power of judging be not separated from the legislative and executive powers." And others of the ablest numbers of that publication are devoted to the purpose of showing that in our constitution these powers are so justly balanced and restrained that neither will probably be able to make much encroachment upon the others. Nor was it less repugnant to their views of the security of personal rights, that any person should be condemned without a hearing, and punished without a law previously prescribing the nature and extent of that punishment. They therefore struck boldly at all this machinery of legislative despotism, by forbidding the passage of bills of attainder and *ex post facto* laws, both to congress and to the states.

§ 632. *The act of 1865 contained no conviction or sentence of any designated person or persons.*

It remains to inquire whether, in the act of congress under consideration (and the remarks apply with equal force to the Missouri constitution), there is found any one of these features of bills of attainder; and if so, whether there is sufficient in the act to bring it fairly within the description of that class of bills. It is not claimed that the law works a corruption of blood. It will, therefore, be conceded at once, that the act does not contain this leading feature of bills of attainder. Nor am I capable of seeing that it contains a conviction or sentence of any designated person or persons. It is said that it is not necessary to a bill of attainder that the party to be affected should be named in the act, and the attainder of the Earl of Kildare and his associates is referred to as showing that the act was aimed at a class. It is very true that bills of attainder have been passed against persons by some description, when their names were unknown. But in such cases the law leaves nothing to be done to render its operation effectual, but to identify those persons. Their guilt, its nature, and its punishment are fixed by the statute, and only their personal identity remains to be made out. Such was the case alluded to. The act declared the guilt and punishment of the Earl of Kildare, and all who were associated with him in his enterprise, and all that was required to insure their punishment was to prove that association. If this were not so, then the act was mere *brutum fulmen*, and the parties other than the earl could only be punished, notwithstanding the act, by proof of their guilt before some competent tribunal. No person is pointed out in the act of congress, either by name or by description, against whom it is to operate. The oath is only required of those who propose to accept an office or to practice law; and as a prerequisite to the exercise of the functions of the lawyer, or the officer, it is demanded of all persons alike. It is said to be directed, as a class, to those alone who were engaged in the rebellion; but this is manifestly incorrect, as the oath is exacted alike from the loyal and disloyal, under the same circumstances, and *none* are compelled to take it. Neither does the act declare any conviction, either of persons or classes. If so, who are they, and of what crime are they declared to be guilty? Nor does it pronounce any sentence, or inflict any punishment. If by any possibility it can be said to *provide* for conviction and sentence, though not found in the act itself, it leaves the party himself to determine his own guilt or innocence, and pronounce his own sentence. It is not, then, the act of congress, but the party interested, that tries and condemns. We shall see, when

we come to the discussion of this act in its relation to *ex post facto* laws, that it inflicts no punishment.

§ 633. *The act of 1865 is not a bill of attainder.*

A statute, then, which designates no criminal, either by name or description — which declares no guilt, pronounces no sentence, and inflicts no punishment — can in no sense be called a bill of attainder.

§ 634. *The ex post facto question considered.*

2. Passing now to consider whether the statute is an *ex post facto* law, we find that the meaning of that term, as used in the constitution, is a matter which has been frequently before this court, and it has been so well defined as to leave no room for controversy. The only doubt which can arise is as to the character of the particular case claimed to come within the definition, and not as to the definition of the phrase itself. All the cases agree that the term is to be applied to criminal causes alone, and not to civil proceedings. In the language of Justice Story, in the case of *Watson v. Mercer*, 8 Pet., 88 (§§ 1849-51, *infra*): "*Ex post facto* laws relate to penal and criminal proceedings, which impose punishment and forfeiture, not to civil proceedings which affect private rights retrospectively." *Calder v. Bull*, 3 Dal., 386 (§§ 582-599, *supra*); *Fletcher v. Peck*, 6 Cranch, 87 (§§ 1805-12, *infra*); *Ogden v. Saunders*, 12 Wheat., 266 (§§ 1940-2003, *infra*); *Satterlee v. Matthewson*, 2 Pet., 380 (§§ 1630-35, *infra*). The first case on the subject is that of *Calder v. Bull*, and it is the one in which the doctrine concerning *ex post facto* laws is most fully expounded. The court divides all laws which come within the meaning of that clause of the constitution into four classes: 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offense to convict the offender.

Again, the court says, in the same opinion, that "the true distinction is between *ex post facto* laws and retrospective laws;" and proceeds to show that, however unjust the latter may be, they are not prohibited by the constitution, while the former are. This exposition of the nature of *ex post facto* laws has never been denied, nor has any court or any commentator on the constitution added to the classes of laws here set forth, as coming within that clause of the organic law. In looking carefully at these four classes of laws, two things strike the mind as common to them all: 1st. That they contemplate the trial of some person charged with an offense. 2d. That they contemplate a punishment of the person found guilty of such offense.

§ 635. *The law of 1865 is not an ex post facto law.*

Now, it seems to me impossible to show that the law in question contemplates either the trial of a person for an offense committed before its passage, or the punishment of any person for such an offense. It is true that the act requiring an oath provides a penalty for falsely taking it. But this provision is prospective, as no one is supposed to take the oath until after the passage of the law. This prospective penalty is the only thing in the law which partakes of a criminal character. It is in all other respects a civil proceeding. It is simply an oath of office, and it is required of all officeholders alike. As far as I am

informed, this is the first time in the history of jurisprudence that taking an oath of office has been called a criminal proceeding. If it is not a criminal proceeding, then, by all the authorities, it is not an *ex post facto* law. No trial of any person is contemplated by the act for any past offense. Nor is any party supposed to be charged with any offense in the only proceeding which the law provides. A person proposing to appear in the court as an attorney is asked to take a certain oath. There is no charge made against him that he has been guilty of any of the crimes mentioned in that oath. There is no prosecution. There is not even an implication of guilt by reason of tendering him the oath, for it is required of the man who has lost everything in defense of the government, and whose loyalty is written in the honorable scars which cover his body, the same as of the guiltiest traitor in the land. His refusal to take the oath subjects him to no prosecution. His taking it clears him of no guilt, and acquits him of no charge.

Where, then, is this *ex post facto* law which tries and punishes a man for a crime committed before it was passed? It can only be found in those elastic rules of construction which cramp the powers of the federal government when they are to be exercised in certain directions, and enlarges them when they are to be exercised in others. No more striking example of this could be given than the cases before us, in one of which the constitution of the United States is held to confer no power on congress to prevent traitors practicing in her courts, while in the other it is held to confer power on this court to nullify a provision of the constitution of the state of Missouri, relating to a qualification required of ministers of religion. But the fatal vice in the reasoning of the majority is in the meaning which they attach to the word punishment, in its application to this law, and in its relation to the definitions which have been given of the phrase, *ex post facto* laws. Webster's second definition of the word "punish" is this: "In a loose sense, to afflict with punishment, etc., with a view to amendment, to chasten." And it is in this loose sense that the word is used by this court, as synonymous with chastisement, correction, loss or suffering to the party supposed to be punished, and not in the legal sense, which signifies a penalty inflicted for the commission of crime. And so, in this sense, it is said that whereas persons who had been guilty of the offenses mentioned in the oath were, by the laws then in force, only liable to be punished with death and confiscation of all their property, they are by a law passed since these offenses were committed made liable to the enormous additional punishment of being deprived of the right to practice law! The law in question does not in reality deprive a person guilty of the acts therein described of any right which he possessed before; for it is equally sound law, as it is the dictate of good sense, that a person who, in the language of the act, has voluntarily borne arms against the government of the United States while a citizen thereof, or who has voluntarily given aid, comfort, counsel or encouragement to persons engaged in armed hostility to the government, has, by doing those things, forfeited his right to appear in her courts and take part in the administration of her laws. Such a person has exhibited a trait of character which, without the aid of the law in question, authorizes the court to declare him unfit to practice before it, and to strike his name from the roll of its attorneys if it be found there.

I have already shown that this act provides for no indictment or other charge, that it contemplates and admits of no trial, and I now proceed to show that even if the right of the court to prevent an attorney, guilty of the



acts mentioned, from appearing in its forum depended upon the statute, that still it inflicts no punishment in the legal sense of that term. "Punishment," says Mr. Wharton in his Law Lexicon, "is the penalty for transgressing the laws;" and this is, perhaps, as comprehensive and at the same time as accurate a definition as can be given. Now, what law is it whose transgression is punished in the case before us? None is referred to in the act, and there is nothing on its face to show that it was intended as an additional punishment for any offense described in any other act. A part of the matters of which the applicant is required to purge himself on oath may amount to treason, but surely there could be no intention or desire to inflict this small additional punishment for a crime whose penalty already was death and confiscation of property. In fact, the word punishment is used by the court in a sense which would make a great number of laws, partaking in no sense of a criminal character, laws for punishment, and therefore *ex post facto*. A law, for instance, which increased the facility for detecting frauds, by compelling a party to a civil proceeding to disclose his transactions under oath, would result in his punishment in this sense, if it compelled him to pay an honest debt which could not be coerced from him before. But this law comes clearly within the class described by this court in *Watson v. Mercer* as civil proceedings which affect private rights retrospectively.

Again, let us suppose that several persons afflicted with a form of insanity, heretofore deemed harmless, shall be found all at once to be dangerous to the lives of persons with whom they associate. The state, therefore, passes a law that all persons so affected shall be kept in close confinement until their recovery is assured. Here is a case of punishment in the sense used by the court for a matter existing before the passage of the law. Is it an *ex post facto* law? And, if not, in what does it differ from one? Just in the same manner that the act of congress does, namely, that the proceeding is civil and not criminal, and that the imprisonment in the one case, and the prohibition to practice law in the other, are not punishments in the legal meaning of that term. The civil law maxim, "*Nemo debet bis vexari, pro una et eadem causa*," has been long since adopted into the common law as applicable both to civil and criminal proceedings, and one of the amendments of the constitution incorporates this principle into that instrument so far as punishment affects life or limb. It results from this rule that no man can be twice lawfully punished for the same offense. We have already seen that the acts of which the party is required to purge himself on oath constitute the crime of treason. Now, if the judgment of the court in the cases before us, instead of permitting the parties to appear without taking the oath, had been the other way, here would have been the case of a person who, on the reasoning of the majority, is punished by the judgment of this court for the same acts which constitute the crime of treason. Yet, if the applicant here should afterwards be indicted for treason on account of these same acts, no one will pretend that the proceedings here could be successfully pleaded in bar of that indictment. But why not? Simply because there is here neither trial nor punishment within the legal meaning of these terms.

I maintain that the purpose of the act of congress was to require loyalty as a qualification of all who practice law in the national courts. The majority say that the purpose was to impose a punishment for past acts of disloyalty. In pressing this argument, it is contended by the majority that no requirement can be justly said to be a qualification which is not attainable by all, and that

to demand a qualification not attainable by all is a punishment. The constitution of the United States provides as a qualification for the offices of president and vice-president that the person elected must be a native-born citizen. Is this a punishment to all those naturalized citizens who can never attain that qualification? The constitutions of nearly all the states require as a qualification for voting that the voter shall be a *white male* citizen. Is this a punishment for all the blacks who can never become white? Again, it was a qualification required by some of the state constitutions, for the office of judge, that the person should not be over sixty years of age. To a very large number of the ablest lawyers in any state this is a qualification to which they can never attain, for every year removes them farther away from the designated age. Is it a punishment?

The distinguished commentator on American law, and chancellor of the state of New York, was deprived of that office by this provision of the constitution of that state, and he was thus, in the midst of his usefulness, not only turned out of office, but he was forever disqualified from holding it again by a law passed after he had accepted the office. This is a much stronger case than that of a disloyal attorney forbid by law to practice in the courts, yet no one ever thought the law was *ex post facto* in the sense of the constitution of the United States. Illustrations of this kind could be multiplied indefinitely, but they are unnecessary. The history of the time when this statute was passed — the darkest hour of our great struggle — the necessity for its existence, the humane character of the president who signed the bill, and the face of the law itself, all show that it was purely a qualification, exacted in self-defense, of all who took part in administering the government in any of its departments, and that it was not passed for the purpose of inflicting punishment, however merited, for past offenses. I think I have now shown that the statute in question is within the legislative power of congress in its control over the courts and their officers, and that it was not void as being either a bill of attainder or an *ex post facto* law. If I am right on the questions of qualification and punishment, that discussion disposes also of the proposition that the pardon of the president relieves the party accepting it of the necessity of taking the oath, even if the law be valid.

§ 636. *The pardon of the president cannot relieve one of the obligation to take the oath as a condition to practicing law.*

I am willing to concede that the presidential pardon relieves the party from all the penalties, or, in other words, from all the punishment, which the law inflicted for his offense. But it relieves him from nothing more. If the oath required as a condition to practicing law is not a punishment, as I think I have shown it is not, then the pardon of the president has no effect in releasing him from the requirement to take it. If it is a qualification which congress had a right to prescribe as necessary to an attorney, then the president cannot, by pardon or otherwise, dispense with the law requiring such qualification. This is not only the plain rule as between the legislative and executive departments of the government, but it is the declaration of common sense. The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counselor-at-law, may be saved by the executive pardon from the penitentiary or the gallows, but is not thereby restored to the qualifications which are essential to admission to the bar. No doubt it will be found that very many persons among those who cannot take this oath deserve to be relieved from the prohibition of the law; but this in

no wise depends upon the act of the president in giving or refusing a pardon. It remains to the legislative power alone to prescribe under what circumstances this relief shall be extended.

§ 637. *Cummings v. The State of Missouri.*

In regard to the case of *Cummings v. The State of Missouri*, allusions have been made in the course of argument to the sanctity of the ministerial office, and to the inviolability of religious freedom in this country. But no attempt has been made to show that the constitution of the United States interposes any such protection between the state governments and their own citizens. Nor can anything of this kind be shown. The federal constitution contains but two provisions on this subject. One of these forbids congress to make any law respecting the establishment of religion, or prohibiting the free exercise thereof. The other is, that no religious test shall ever be required as a qualification to any office or public trust under the United States. No restraint is placed by that instrument on the action of the states; but on the contrary, in the language of Story (*Commentaries on the Constitution*, § 1878), "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice and the state constitutions."

If there ever was a case calling upon this court to exercise all the power on this subject which properly belongs to it, it was the case of the Rev. B. Permolli, 3 How., 589 (§§ 475-477, *supra*). An ordinance of the first municipality of the city of New Orleans imposed a penalty on any priest who should officiate at any funeral, in any other church than the obituary chapel. Mr. Permolli, a Catholic priest, performed the funeral services of his church over the body of one of his parishioners, inclosed in a coffin, in the Roman Catholic Church of St. Augustine. For this he was fined, and relying upon the vague idea advanced here, that the federal constitution protected him in the exercise of his holy functions, he brought the case to this court. But hard as that case was, the court replied to him in the following language: "The constitution (of the United States) makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the constitution of the United States in this respect on the states." Mr. Permolli's writ of error was, therefore, dismissed for want of jurisdiction. In that case an ordinance of a mere local corporation forbid a priest, loyal to his government, from performing what he believed to be the necessary rites of his church over the body of his departed friend. This court said it could give him no relief.

In this case the constitution of the state of Missouri, the fundamental law of the people of that state, adopted by their popular vote, declares that no priest of any church shall exercise his ministerial functions, unless he will show, by his own oath, that he has borne a true allegiance to his government. This court now holds this constitutional provision void, on the ground that the federal constitution forbids it. I leave the two cases to speak for themselves. In the discussion of these cases I have said nothing, on the one hand, of the great evils inflicted on the country by the voluntary action of many of those persons affected by the laws under consideration; nor, on the other hand, of the hardships which they are now suffering, much more as a consequence of that action than of any laws which congress can possibly frame. But I have endeavored to bring to the examination of the grave questions of constitutional law involved in this inquiry those principles alone which are calculated to assist in

determining what the law is, rather than what, in my private judgment, it ought to be.

§ 638. Retrospective laws.—Retrospective laws are not void unless they are made so by express constitutional provision. And a constitutional provision cannot be objected to because it is retrospective, although the same constitution may forbid retrospective statutes. *Clark v. Dick*, \* 1 Dill., 8. See §§ 20, 565.

§ 639. Retrospective laws of a state, which do not impair the obligation of contracts or partake of the character of *ex post facto* laws, are not forbidden by the constitution of the United States. *Satterlee v. Matthewson*, 2 Pet., 380 (§§ 1630-35).

§ 640. State retrospective laws, which do not impair the obligation of a contract, are not unconstitutional because they affect the value of the contract or enhance the difficulty of its performance. If the binding efficacy of the contract remains the law is valid. *Curtis v. Whitney*, 13 Wall., 68 (§ 1821).

§ 641. The constitution does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws. *Watson v. Mercer*, 8 Pet., 88 (§§ 1849-51).

§ 642. A retrospective statute is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past. The Society for the Propagation of the Gospel, etc., v. *Wheeler*, 2 Gall., 139.

§ 643. A retrospective law which operates to destroy an estate in lands is void under the constitution of Maine, especially where suit was pending at the time of its enactment. *Webster v. Cooper*, 14 How., 501.

§ 644. The law of New Hampshire of June 19, 1805, so far as it allows a tenant to recover the value of improvements made by him before the enactment of the law, is unconstitutional under that clause of the state constitution forbidding the enactment of retrospective laws. *The Society for Propagation of Gospel v. Wheeler*, 2 Gall., 139.

§ 645. A law of Tennessee which provided that where a deed had been actually registered for more than twenty years it should be deemed to have been lawfully registered, though it operates in respect to deeds previously registered and offered in evidence after its passage, is not a retrospective law within the meaning of the constitution of that state. *Webb v. Den*, 17 How., 577.

§ 646. A law which seeks to defeat rights acquired before its approval by the governor, but after its passage by the legislature, is a retrospective law, and void. *Memphis v. United States*, 7 Otto, 293 (§§ 1888-94).

§ 647. A law exempting two wards of a city from taxation for the purpose of satisfying the claims of a contractor under contracts for improvements of streets made prior to annexation of such wards, but the greater portion of which were completed thereafter, such wards never having received any benefit therefrom, is not a retrospective law, but a mere provision for compelling those receiving benefits to pay their cost. *United States v. Memphis*, 7 Otto, 285 (§§ 1888-86).

§ 648. A state legislature has the power to direct a city to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent; and such a statute is not retroactive and within a constitutional prohibition against the passage of retrospective laws. *New Orleans v. Clark*, 5 Otto, 654.

§ 649. A state statute allowing an unsuccessful defendant in ejectment to recover for improvements made before its passage, although retrospective is not void as being an *ex post facto* law, or as impairing the obligation of a contract. *Albee v. May*, 2 Paine, 76; *Society for Propagation of Gospel v. Wheeler*, 2 Gall., 138.

§ 650. *Ex post facto* laws relate to penal and criminal proceedings, and not to civil proceedings which affect private rights retrospectively. *Watson v. Mercer*, 8 Pet., 88 (§§ 1849-51). See §§ 565, 2711.

§ 651. Laws are *ex post facto* in their operation, so far as they make that criminal or penal which was not so at the time the act was done, or which increase the punishment; or, in short, which, in relation to the offense or its consequences, alter the situation of the party to his disadvantage, whatever be the form of the law. *United States v. Hall*, 1 Wash., 366; *In re De Giacomo*, 12 Blatch., 401; *Burgess v. Salmon*, 7 Otto, 334 (§§ 2708-11); *Falconer v. Campbell*, 2 McL., 212.

§ 652. An act forfeiting an estate, not on account of a crime committed by the person holding the estate, but on account of a crime committed by those from whom he purchased, has the effect of an *ex post facto* law. *Fletcher v. Peck*, 6 Cr., 87 (§§ 1805-12).

§ 653. A law authorizing the imposition of a tax according to the assessment of a previous year is not unconstitutional as being an *ex post facto* law. *Locke v. New Orleans*, \* 4 Wall., 172.

§ 654. The fifth section of the act of July 22, 1874 (18 Statutes at Large, 187), which authorized the district courts, on motion of the district attorney, in cases to enforce forfeitures and penalties under the revenue laws, to require the production of books and papers relating to the alleged fraudulent transaction, under pain of having the allegations in the motion taken as confessed, is an *ex post facto* law so far as it applies to suits for violation of the revenue laws pending at the time it was enacted, and therefore unconstitutional and void. The inhibition of *ex post facto* laws applies not merely to criminal cases, but to cases to enforce penalties and forfeitures. The law in question has the effect of requiring the accused to prove his innocence instead of requiring the government to prove his guilt. *United States v. Hughes*, 8 Ben., 29.

§ 655. The convention of extradition between the United States and Italy (15 Statutes at Large, 629) is not an *ex post facto* law, either as to offenses committed before or after it was entered into. Extradition is in no sense a punishment. *In re De Giacomo*, 12 Blatch., 401.

§ 656. Bills of attainder.—A bill of attainder is a legislative act which inflicts punishment without a judicial trial, where the legislature assumes judicial magistracy, exercises the office of a judge, pronounces upon the guilt of the accused without any of the forms or safeguards of a trial, and fixes the punishment. The convention of extradition between the United States and Italy (15 Statutes at Large, 629), and the laws carrying it into effect, contain no provisions within this rule. *Ibid.* See § 572.

§ 657. It seems that the constitutional provision which declares that no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted, does not apply to the confiscation of enemies' property, even though those enemies be rebels against the government, and therefore guilty of treason. *The Confiscation Cases*, 1 Woods, 221; *The Schooner Ned, Bl. Pr. Cas.*, 120; *Semple v. United States*, Chase's Dec., 261.

§ 658. Section 44 of the act of July 20, 1863 (15 Statutes at Large, 142), which declares that real property shall be forfeited which is employed in the violation of the revenue laws of the United States, is not unconstitutional as being in the nature of a bill of attainder. *United States v. A Distillery*, 2 Abb., 193.

§ 659. The act of March, 1778, of the state of Pennsylvania, authorizing the supreme executive council of the state to issue a proclamation, calling upon all persons inhabitant of that state, or who had real estate within the same, and who adhered to the enemy, to surrender themselves on or before a certain day, before some magistrate of the state, and stand their trial, under pain of standing attainted, and forfeiting their estates as in cases of treason, is held to have been valid. *Hylton v. Brown*, 1 Wash., 293.

§ 660. The fourth section of the constitution of Missouri of 1865, providing that "no person shall be prosecuted in any civil action for or on account of any act by him done, performed or executed, after the 1st of January, 1861, by virtue of military authority vested in him by the government of the United States, or that of this state, to do such acts, or in pursuance to orders received by him from any person vested with such authority; and if any action or proceeding shall have heretofore been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof," is not a bill of attainder within the meaning of the constitutional provision forbidding the states to pass bills of attainder. *Drehman v. Stifle*, \* 8 Wall., 595.

§ 661. In 1864, certain non-residents, without personal service upon them, and without their appearing in the action, had a judgment rendered against them in West Virginia, under an existing statute of that state, which provided that in such a case the defendant could, upon openly returning to the state and filing a petition for that purpose, obtain a rehearing and make defense. They offered such a petition within the year, but were not allowed to file it because it did not conform to an act, passed since the judgment was rendered, requiring them to take a test oath that they had never participated or aided in, or sympathized with, the rebellion. It was held that the act requiring the oath was unconstitutional, as being not only a bill of attainder but also an *ex post facto* law. (BRADLEY, J., dissenting.) *Pierce v. Clarkson*, \* 16 Wall., 234.

§ 662. The provision in the constitution of Missouri declaring that no person shall be prosecuted in any civil action or criminal proceeding for acts done by him, after the first day of January, 1861, by virtue of military authority vested in him by the United States to do such act, or in pursuance of orders from any person vested with such authority; and if any action shall heretofore have been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof, is held not to be a bill of attainder, or *ex post facto* law, or law impairing the obligation of contracts. *Clark v. Dick*, \* 1 Dill., 8.

V. DUE PROCESS OF LAW.

SUMMARY — *Constitutional provisions*, § 663. — *Defined*, §§ 664-667. — *Summary process*, § 668. — *Trial by jury*, § 669. — *Speedy trial and appeal*, §§ 670, 671. — *Taxation for public purposes*, § 672. — *Unequal taxation*, § 673. — *Notice and hearing in case of an assessment*, § 674. — *Enjoining taxes; requiring security*, § 675.

§ 663. "No person shall be . . . deprived of life, liberty or property without due process of law." Const., Fifth Amendment. "Nor shall any state deprive any person of life, liberty or property without due process of law." Fourteenth Amendment, sec. 1.

§ 664. The words "due process of law" were undoubtedly intended to convey the same meaning as the words "by the law of the land," in *Magna Charta*. In order to ascertain whether certain process is due process, we must first examine the constitution, to see whether the process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition, by having been acted on by them after the settlement of this country. *Murray v. Hoboken Land and Improvement Co.*, §§ 676-689.

§ 665. "Due process of law" means "law of the land," but no precise definition of the term has been given which will apply to all cases. *Davidson v. New Orleans*, §§ 701-709.

§ 666. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the states. *Walker v. Sauvinet*, §§ 690-692.

§ 667. "Due process of law" does not mean judicial process. *McMillen v. Anderson*, §§ 710-712.

§ 668. Summary process for the collection of deficits in officers' accounts with the government, ascertained by auditing and a levy thereunder on their property, is "due process of law." Nor is such a proceeding judicial in its nature. *Murray v. Hoboken, etc., Co.*, §§ 676-689.

§ 669. The deprivation of trial by jury, by a state, under its constitution or valid laws, is not a deprivation of life, liberty or property without due process of law. *Walker v. Sauvinet*, §§ 690-692.

§ 670. "Due process of law" does not necessarily imply delay. A law providing for a speedy trial and appeal, but giving the parties a chance to be heard before a court of competent jurisdiction, is due process. *Kennard v. Louisiana*, §§ 693, 694.

§ 671. A state law provided that a claimant of an office might proceed by rule before a court of competent jurisdiction to have himself declared entitled to the office. The rule was made returnable within twenty-four hours, and was triable immediately, without a jury. Judgment was to be signed the same day, and one day was allowed for taking an appeal and two days within which to return it. *Held*, that this was "due process of law." *Ibid*.

§ 672. No person is deprived of his property "without due process of law" by reason of taxation which is levied for public uses, according to the uniform method prescribed by the state, although such taxes are laid for ordinary city purposes, and the lands of the plaintiff lie outside the city limits, and receive no benefit from the various objects to support which such taxes are laid. *Kelly v. Pittsburgh*, §§ 695-700.

§ 673. There is nothing in the federal constitution or its amendments, and particularly the fourteenth, which forbids a state to levy unequal taxation. *Davidson v. New Orleans*, §§ 701-709.

§ 674. Where a statute imposing an assessment requires a tableau of assessments to be filed in a court of justice, and that personal service of notice, with reasonable time to object, be made on all owners known and within reach of process, and notice by advertisement to all others, and extending a full and fair hearing to those objecting to the assessment, no one is deprived of his property "without due process of law." *Ibid*.

§ 675. A seizure of property, after notice to its owner to pay the taxes thereon, and its sale therefor, and a requirement that the owner shall give security for the payment of double taxes upon the dissolution of the injunction, before he shall be allowed an injunction to restrain the sale on the ground of illegality of the assessment, is, if according to the laws of the state, not a deprivation of property "without due process of law." "Due process of law" does not necessarily mean judicial process. *McMillen v. Anderson*, §§ 710-712.

[NOTES.— See §§ 713-729.]

## MURRAY v. HOBOKEN LAND AND IMPROVEMENT COMPANY.

(18 Howard, 272-286. 1855.)

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—This case comes before us on a certificate of division of opinion of the judges of the circuit court of the United States for the district of New Jersey. It is an action of ejectment, in which both parties claim title under Samuel Swartwout—the plaintiffs, under the levy of an execution on the 10th day of April, 1839, and the defendants under a sale made by the marshal of the United States for the district of New Jersey on the 1st day of June, 1839—by virtue of what is denominated a distress warrant issued by the solicitor of the treasury under the act of congress of May 15, 1820, entitled “An act providing for the better organization of the treasury department.” This act having provided, by its first section, that a lien for the amount due should exist on the lands of the debtor from the time of the levy and record thereof in the office of the district court of the United States for the proper district, and the date of that levy in this case being prior to the date of the judgment under which the plaintiffs’ title was made, the question occurred in the circuit court “whether the said warrant of distress in the special verdict mentioned, and the proceedings thereon and anterior thereto, under which the defendants claim title, are sufficient, under the constitution of the United States and the law of the land, to pass and transfer the title and estate of the said Swartwout in and to the premises in question, as against the lessors of the plaintiff.” Upon this question, the judges being of opposite opinions, it was certified to this court, and has been argued by counsel.

No objection has been taken to the warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the act of congress. The special verdict finds that Swartwout was collector of the customs for the port of New York for eight years before the 29th of March, 1838; that on the 10th of November, 1838, his account, as such collector, was audited by the first auditor, and certified by the first comptroller of the treasury; and for the balance thus found, amounting to the sum of \$1,374,119.65, the warrant in question was issued by the solicitor of the treasury. Its validity is denied by the plaintiffs, upon the ground that so much of the act of congress as authorized it is in conflict with the constitution of the United States. In support of this position the plaintiff relies on that part of the first section of the third article of the constitution which requires the judicial power of the United States to be vested in one supreme court and in such inferior courts as congress may, from time to time, ordain and establish; the judges whereof shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Also, on the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party. It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

§ 676. "*Due process of law*" defined.

The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the act in question is to deprive the party against whom the warrant issues of his liberty and property, "without due process of law;" and, therefore, is in conflict with the fifth article of the amendments of the constitution. Taking these two objections together, they raise the questions, whether, under the constitution of the United States, a collector of the customs, from whom a balance of account has been found to be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the constitution; and if so, then, secondly, whether the warrant in question was such due process of law? The words, "due process of law," were undoubtedly intended to convey the same meaning as the words "by the law of the land," in *Magna Charta*. Lord Coke, in his commentary on those words (2 Inst., 50), says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.

The constitution of the United States, as adopted, contained the provision that "the trial of all crimes, except in cases of impeachment, shall be by jury." When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the state constitutions, and in the ordinance of 1787, the words of *Magna Charta*, and declared that no person shall be deprived of his life, liberty or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on *Magna Charta* had declared to be the true meaning of the phrase, "law of the land," in that instrument, and which were undoubtedly then received as their true meaning.

§ 677. *How to ascertain whether process is due process.*

That the warrant now in question is legal process is not denied. It was issued in conformity with an act of congress. But is it "due process of law?" The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine



the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

§ 678. *Summary process used in England to recover debts due the crown.*

We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages of the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of *Magna Charta* treats of their restraint. It declares: "We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor. Neither shall the pledges of the debtor be distrained as long as the principal debtor is sufficient for the payment of the debt, and if the principal debtor fail in payment of the debt, having nothing wherewith to pay or will not pay where he is able, the pledges shall answer for the debt. And if they will, they shall have the lands and rents of the debtor until they be satisfied of the debt which they before paid for him, except that the principal debtor can show himself to be acquitted against the said sureties."

By the common law, the body, lands and goods of the king's debtor were liable to be levied on to obtain payment. In conformity with the above provision of *Magna Charta*, a conditional writ was framed, commanding the sheriff to inquire of the goods and chattels of the debtor, and if they were insufficient, then to extend on the lands. 3 Co., 12b; Com. Dig., Debt, G. 2; 2 Inst., 19. But it is said that since the statute 33 Hen. VIII., c. 39, the practice has been to issue the writ in an absolute form without requiring any previous inquisition as to the goods. Gilbert's Exch., 127. To authorize a writ of extent, however, the debt must be matter of record in the king's exchequer. The 33 Hen. VIII., c. 39, § 50, made all specialty debts due to the king of the same force and effect as debts by statute staple, thus giving to such debts the effect of debts of record. In regard to debts due upon simple contract, other than those due from collectors of the revenue and other accountants of the crown, the practice, from very ancient times, has been to issue a commission to inquire as to the existence of the debt. This commission being returned, the debt found was thereby evidenced by a record, and an extent could issue thereon. No notice was required to be given to the alleged debtor of the execution of this commission (2 Tidd's Pr., 1047), though it seems that, in some cases, an order for notice might be obtained. 1 Ves., 269. Formerly, no witnesses were examined by the commission (Chitty's Prerog., 267; West, 22); the affidavit prepared to obtain an order for an immediate extent being the only evidence introduced. But this practice has been recently changed. 11 Price, 29. By the statute 13 Eliz., ch. 4, balances due from receivers of the revenue and all other accountants of the crown were placed on the same footing as debts acknowledged to be due by statute staple. These balances were found by auditors, the particular officers acting thereon having been, from time to time, varied by legislation and usage. The different methods of accounting in ancient and modern times are described

in Mr. Price's Treatise on the Law and Practice of the Exchequer, ch. 9. Such balances, when found, were certified to what was called the pipe office, to be given in charge to the sheriffs for their levy. Price, 231. If an accountant failed to render his accounts, a process was issued, termed a *capias nomine districtionis*, against the body, goods and lands of the accountant. Price, 162, 233, note 3. This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects, and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the act of 1820, now in question.

§ 679. — *such provisions are universal for the summary collection of state claims.*

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the states, after the declaration of independence and before the formation of the constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it. Without a wearisome repetition of details, it will be sufficient to give one section from the Massachusetts act of 1786: "That if any constable or collector, to whom any tax or assessment shall be committed to collect, shall be remiss and negligent of his duty in not levying and paying unto the treasurer and receiver-general such sum or sums of money as he shall from time to time have received, and as ought by him to have been paid within the respective time set and limited by the assessor's warrant, pursuant to law, the treasurer and receiver-general is hereby empowered, after the expiration of the time so set, by warrant under his hand and seal, directed to the sheriff or his deputy, to cause such sum and sums of money to be levied by distress and sale of such deficient constable or collector's estate, real and personal, returning the overplus, if any there be; and, for want of such estate, to take the body of such constable or collector, and imprison him until he shall pay the same; which warrant the sheriff or his deputy is hereby empowered and required to execute accordingly." Then follows another provision, that if the deficient sum shall not be made by the first warrant, another shall issue against the town; and if its proper authorities shall fail to take the prescribed means to raise and pay the same, a like warrant of distress shall go against the estates and bodies of the assessors of such town. Laws of Massachusetts, vol. I, p. 266. Provisions not distinguishable from these in principle may be found in the acts of Connecticut (Revision of 1784, p. 198); of Pennsylvania, 1782 (2 Laws of Penn., 13); of South Carolina, 1788 (5 Stats. of S. C., 55); New York, 1788 (1 Jones & Varick's Laws, 34); see, also, 1 Henning's Stats. of Virginia, 319, 343; 12 id., 562; Laws of Vermont (1797, 1800), 340. Since the formation of the constitution of the United States, other states have passed similar laws. See 7 La. Ann., 192. Congress, from an early period, and in repeated

instances, has legislated in a similar manner. By the fifteenth section of the "Act to lay and collect a direct tax within the United States," of July 14, 1798, the supervisor of each district was authorized and required to issue a warrant of distress against any delinquent collector and his sureties, to be levied upon the goods and chattels, and for want thereof upon the body of such collector; and, failing of satisfaction thereby, upon the goods and chattels of the sureties. 1 Stats. at Large, 602. And again, in 1813 (3 Stats. at Large, 33, § 28) and 1815 (3 Stats. at Large, 177, § 33), the comptroller of the treasury was empowered to issue a similar warrant against collectors of the customs and their sureties. This legislative construction of the constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence, and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was "due process of law." *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 621; *United States v. Nourse*, 9 Pet., 8; *Randolph's Case*, 2 Brock., 447; *Nourse's Case*, 4 Cranch C. C., 151; *Bullock's Case* (cited, 6 Pet., 485, note).

§ 680. *The provisions of the constitution relating to the judicial power are not incompatible with summary proceedings.*

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the constitution some other provision which restrains congress from authorizing such proceedings. For, though "due process of law" generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst., 47, 50; *Hoke v. Henderson*, 4 Dev. (N. C.), 15; *Taylor v. Porter*, 4 Hill, 146; *Van Zandt v. Waddel*, 2 Yerg., 260; *State Bank v. Cooper*, id., 599; *Jones v. Perry*, 10 id., 59; *Greene v. Briggs*, 1 Curt., 311), yet this is not universally true. There may be, and we have seen that there are, cases under the law of England after *Magna Charta*, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the constitution which relate to the judicial power are incompatible with these proceedings?

§ 681. *Auditing accounts of receiver of public money, and charging him therewith in distress warrant, is not the exercise of "judicial power" in the sense of the constitution.*

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the president in calling out the militia under the act of 1795 (12 Wheat., 19), or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient, to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United States v. Ferreira*, 13 How., 40. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the

United States is a party, within the meaning of the second section of the third article of the constitution. We do not doubt the power of congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is, whether its subject-matter is necessarily, and without regard to the consent of congress, a judicial controversy. And we are of opinion it is not.

§ 682. *Legislative power of congress extends to levying and collecting taxes.*

Among the legislative powers of congress are the powers "to lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defense and welfare of the United States, to raise and support armies; to provide and maintain a navy, and to make all laws which may be necessary and proper for carrying into execution those powers." What officers should be appointed to collect the revenue thus authorized to be raised, and to disburse it in payment of the debts of the United States; what duties should be required of them; when and how, and to whom they should account, and what security they should furnish, and to what remedies they should be subjected to enforce the proper discharge of their duties, congress was to determine. In the exercise of their powers, they have required collectors of customs to be appointed; made it incumbent on them to account, from time to time, with certain officers of the treasury department, and to furnish sureties, by bond, for the payment of all balances of the public money which may become due from them. And by the act of 1820, now in question, they have undertaken to provide summary means to compel these officers — and, in case of their default, their sureties — to pay such balances of the public money as may be in their hands.

§ 683. *The power to collect revenue includes all appropriate means of collecting it.*

The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government; and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues. As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity — and in many of the states, so far as we know, without objection — for this purpose, at the time the constitution was formed. It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to. It is true that in England all these proceedings were had in what is denominated the court of exchequer, in which Lord Coke says, 4 Inst., 115, the barons are the sovereign auditors of the kingdom. But the barons exercise in person no judicial power in auditing accounts, and it is necessary to remem-

ber that the exchequer includes two distinct organizations, one of which has charge of the revenues of the crown, and the other has long been in fact, and now is for all purposes, one of the judicial courts of the kingdom, whose proceedings are and have been as distinct, in most respects, from those of the revenue side of the exchequer, as the proceedings of the circuit court of this district are from those of the treasury; and it would be an unwarrantable assumption to conclude that, because the accounts of receivers of revenue were settled in what was denominated the court of exchequer, they were judicial controversies between the king and his subjects, according to the ordinary course of the common law or equity. The fact, as we have already seen, was otherwise.

§ 684. *Providing for a review of the action of the auditor by the court does not render his action judicial.*

It was strongly urged by the plaintiff's counsel, that though the government might have the rightful power to provide a summary remedy for the recovery of its public dues, aside from any exercise of the judicial power, yet it had not done so in this instance. That it had enabled the debtor to apply to the judicial power, and having thus brought the subject-matter under its cognizance, it was not for the government to say that the subject-matter was not within the judicial power. That if it were not in its nature a judicial controversy, congress could not make it such, nor give jurisdiction over it to the district courts. In short, the argument is, that if this were not, in its nature, a judicial controversy, congress could not have conferred on the district court power to determine it upon a bill filed by the collector. If it be such a controversy, then it is subject to the judicial power alone; and the fact that congress has enabled the district court to pass upon it, is conclusive evidence that it is a judicial controversy. We cannot admit the correctness of the last position. If we were of opinion that this subject-matter cannot be the subject of a judicial controversy, and that, consequently, it cannot be made a subject of judicial cognizance, the consequence would be, that the attempt to bring it under the jurisdiction of a court of the United States would be ineffectual. But the previous proceedings of the executive department would not necessarily be affected thereby. They might be final, instead of being subject to judicial review. But the argument leaves out of view an essential element in the case, and also assumes something which cannot be admitted. It assumes that the entire subject-matter is or is not, in every mode of presentation, a judicial controversy, essentially and in its own nature, aside from the will of congress to permit it to be so; and it leaves out of view the fact that the United States is a party. It is necessary to take into view some settled rules.

§ 685. *Instances of cases where parties may obtain redress without the assistance of the machinery of justice.*

Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extrajudicial remedies for both. An instance of extrajudicial redress of a private wrong is, the recapture of goods by their lawful owner; of a public wrong, by a private person, is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents. There is, however, an important distinction between these. Though a private person may retake his property, or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals.

His authority to do these acts depends not merely on the law, but upon the existence of such facts as are, in point of law, sufficient to constitute that authority; and he may be required, by an action at law, to prove those facts; but a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent. At the same time there can be no doubt that the mere question, whether a collector of the customs is indebted to the United States, may be one of judicial cognizance. It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the government are exempt from suit, for anything done by the former in obedience to legal process, still, congress may provide by law that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extrajudicial remedies for their wrongs, and they may do so to such extent, and with such restrictions, as may be thought fit.

When, therefore, the act of 1820 enacts that, after the levy of the distress warrant has been begun, the collector may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future proceedings dependent on the judgment of the court; as we have already stated in case of a private person, every fact upon which the legality of the extrajudicial remedy depends may be drawn in question by a suit against him. The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court.

§ 686. *Congress cannot enlarge or diminish the sphere of judicial power.*

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title. *Foley v. Harrison*, 15 How., 433; *Burgess v. Gray*, 16 How., 48; ——— *v. Minnesota Mining Co.*, at the

present term. It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the constitution and laws, is conclusive. *Luther v. Borden*, 7 How., 1; *Doe v. Braden*, 16 How., 635.

§ 687. *The summary process provided by the act of 1820 is constitutional.*

To apply these principles to the case before us, we say that, though a suit may be brought against the marshal for seizing property under such a warrant of distress, and he may be put to show his justification, yet the action of the executive power in issuing the warrant, pursuant to the act of 1820, passed under the powers to collect and disburse the revenue granted by the constitution, is conclusive evidence of the facts recited in it, and of the authority to make the levy; that though no suit can be brought against the United States without the consent of congress, yet congress may consent to have a suit brought, to try the question whether the collector be indebted, that being a subject capable of judicial determination, and may empower a court to act on that determination, and restrain the levy of the warrant of distress within the limits of the debt judicially found to exist. It was further urged, that, by thus subjecting the proceeding to the determination of a court, it did conclusively appear that there was no such necessity for a summary remedy, by the action of the executive power, as was essential to enable congress to authorize this mode of proceeding. But it seems to us that the just inference from the entire law is, that there was such a necessity for the warrant and the commencement of the levy, but not for its completion, if the collector should interpose, and file his bill and give security. The provision that he may file his bill and give security, and thus arrest the summary proceedings, only proves that congress thought it not necessary to pursue them, after such security should be given, until a decision should be made by the court. It has no tendency to prove they were not, in the judgment of congress, of the highest necessity under all other circumstances; and of this necessity congress alone is the judge.

§ 688. *Summary process for debts due the government is not a search warrant and need not be under oath.*

The remaining objection to this warrant is, that it was issued without the support of an oath or affirmation, and so was forbidden by the fourth article of the amendments of the constitution. But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part. The process, in this case, is termed, in the act of congress, a warrant of distress. The name bestowed upon it cannot affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other authority is conferred to make searches or seizures than is ordinarily embraced in every execution issued upon a recognizance, or a stipulation in the admiralty, we are of opinion it was not invalid for this cause.

§ 689. *A levy of a warrant upon land is prima facie evidence that there were no goods or chattels on which to levy.*

Some objection was made to the proceedings of the marshal under the warrant, because he did not levy on certain shares of corporate stock belonging to Swartwout, and because it does not appear, by the return of the warrant, that he had not goods and chattels wherewith to satisfy the exigency of the warrant. In respect to the corporate stocks, they do not appear to have been goods or chattels subject to such levy at the time it was made; and the return of the marshal, that he had levied on the lands by virtue of the warrant, is, at least,

*prima facie* evidence that his levy was not irregular, by reason of the existence of goods and chattels of the collector subject to his process. The third question is, therefore, to be answered in the affirmative. This renders the other questions proposed immaterial, and no answer need be returned thereto.

The other two cases — *Murray v. Hoboken Land & Improvement Co.*, and *Rathbone v. Suckley*, are disposed of by this opinion, the same questions having been certified therein.

WALKER v. SAUVINET.

(2 Otto, 90-93. 1875.)

ERROR to the Supreme Court of Louisiana.

STATEMENT OF FACTS.—This was an action under an act of the legislature of Louisiana, enacted for the purpose of enforcing the thirteenth article of the state constitution. This act was passed in 1869, and in 1871 another act was passed, providing that in the trial of cases either party might demand a jury, and if the jury disagreed, the court was directed to decide the case at once, without further delay. The jury disagreed in this case, and the plaintiff moved that the court proceed to decide the case. The defendant objected, alleging that the act of 1871 was unconstitutional, but failing to specify in what particular.

Opinion by WATTE, C. J.

So far as we can discover from the record, the only federal question decided by either one of the courts below was that which related to the right of Walker to demand a trial by jury, notwithstanding the provisions of the act of 1871 to the contrary. He insisted that he had a constitutional right to such a trial, and that the statute was void to the extent that it deprived him of this right.

§ 690. *Trial by jury in state courts is not a privilege of national citizenship, and trial without a jury is due process of law.*

All questions arising under the constitution of the state alone are finally settled by the judgment below. We can consider only such as grow out of the constitution of the United States. By article 7 of the amendments it is provided that, "in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved." This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards v. Elliot*, 21 Wall., 557. The states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law, pending in the state courts, is not, therefore, a privilege or immunity of national citizenship which the states are forbidden by the fourteenth amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray v. Hoboken Land & Improvement Co.*, 18 How., 280 (§§ 676-689, *supra*).

§ 691. *Due process of law defined.*

Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land — that is to say, with the constitution, and laws of the United States made in pursuance thereof,—or with any treaty made under the authority of the



United States. Art. 6, Const. Here the state court has decided that the proceeding below was in accordance with the law of the state; and we do not find that to be contrary to the constitution, or any law or treaty of the United States.

§ 692. *To receive consideration in this court, the record must show that the questions were submitted to the lower court.*

The other questions presented by the assignment of errors, and argued here, cannot be considered, as the record does not show that they were brought to the attention of either of the courts below.

*Judgment affirmed.*

JUSTICES FIELD and CLIFFORD dissented.

#### KENNARD v. LOUISIANA.

(2 Otto, 480-483. 1875.)

ERROR to the Supreme Court of Louisiana.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The sole question presented for our consideration in this case, as stated by the counsel for the plaintiff in error, is, whether the state of Louisiana, acting under the statute of January 15, 1873, through her judiciary, has deprived Kennard of his office without due process of law. It is substantially admitted by counsel in the argument that such is not the case, if it has been done “in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.” We accept this as a sufficient definition of the term “due process of law,” for the purposes of the present case. The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guarantied by the constitution. Irregularities and mere errors in the proceedings can only be corrected in the state courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all.

This makes it necessary for us to examine the law under which the proceedings were had, and determine its effect. It was entitled “An act to regulate proceedings in contestations between persons claiming a judicial office.” Section 1 provided that “in any case in which a person may have been appointed to the office of judge of any court in this state, and shall have been confirmed by the senate and commissioned thereto, . . . such commission shall be *prima facie* proof of the right of such person to immediately hold and exercise such office.” It will thus be seen that the act relates specially to the judges of the courts of the state, and to the internal regulations of a state in respect to its own officers. The second section then provides, “that if any person, being an incumbent of such office, shall refuse to vacate the same, and turn the same over to the person so commissioned, such person so commissioned shall have the right to proceed by *rule* before the court of competent jurisdiction, to have himself declared to be entitled to such office, and to be inducted therein. Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately without jury, and by preference over all matter or causes depending in such court; . . . and the judgment thereon shall be signed the same day of rendition.”

§ 693. *A rule on an incumbent of an office to show cause, made returnable within twenty-four hours, is process.*

There is here no provision for a technical "citation," so called; but there is, in effect, provision for a rule upon the incumbent to show cause why he refuses to surrender his office, and for service of this rule upon him. The incumbent was, therefore, to be formally called upon by a court of competent jurisdiction to give information to it, in an adversary proceeding against him, of the authority by which he assumed to perform the duties of one of the important offices of the state. He was to be told when and where he must make his answer. The law made it the duty of the court to require this return to be made within twenty-four hours, and it placed the burden of proof upon him. But it required that he should be called upon to present his case before the court could proceed to judgment. He had an opportunity to be heard before he could be condemned. This was "process;" and, when served, it was sufficient to bring the incumbent into court, and to place him within its jurisdiction. In this case, it is evident from the record that the rule was made, and that it was in some form brought to the attention of Kennard; for on the return day he appeared. At first, instead of showing cause why he refused to vacate his office, he objected that he had not been properly cited to appear; but the court adjudged otherwise. He then made known his title to the office; in other words, he showed cause why he refused to vacate. This was, in effect, that he had been commissioned to hold the office till the end of the next session of the senate, and that time had not arrived.

§ 694. *State may deny a jury trial; due process of law does not imply delay.*

Upon this he asked a trial by jury. This the court refused, and properly, because the law under which the proceedings were had provided in terms that there should be no such trial. He then went to trial. No delays were asked except such as were granted. Judgment was speedily rendered; but ample time and opportunity were given for deliberation. Due process of law does not necessarily imply delay; and it is certainly no improper interference with the rights of the parties to give such cases as this precedence over the other business in the courts. The next section provides for an appeal. True, it must be taken within one day after the rendition of the judgment, and is made returnable to the supreme court within two days. The proceeding on appeal was given preference over all other business in the appellate court, and the judgment upon the appeal was made final after the expiration of one day. Kennard availed himself of this right. He took his appeal and was heard. The court considered the case and gave its judgment. From this it appears that ample provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the state, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the act. The remedy provided was certainly speedy; but it could only be enforced by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case,

the party complaining not only had the right to be heard, but he was in fact heard, both in the court in which the proceedings were originally instituted, and, upon his appeal, in the highest court of the state.

*Judgment affirmed.*

KELLY v. PITTSBURGH.

(14 Otto, 78-83. 1881.)

ERROR to the Supreme Court of Pennsylvania.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The plaintiff in error, James Kelly, is the owner of eighty acres of land, which, prior to the year 1867, was a part of the township of Collins, in the county of Alleghany and state of Pennsylvania. In that year the legislature passed an act by virtue of which, and the subsequent proceedings under it, this township became a part of the city of Pittsburgh. The authorities of the city assessed the land, for the taxes of the year 1874, at a sum which he asserts is enormously beyond its value, and almost destructive of his interest in the property. They are divisible into two classes; namely, those assessed for state and county purposes by the county of Alleghany, within which Pittsburgh is situated, and those assessed by the city for city purposes. Kelly took an appeal, allowed by the laws of Pennsylvania, from the original assessment of taxes to a board of revision, but with what success does not distinctly appear. The result, however, was unsatisfactory to him, and he brought suit in the court of common pleas to restrain the city from collecting the tax. That court dismissed the bill, and the decree having been affirmed on appeal by the supreme court, he sued out this writ of error.

The transcript of the record is accompanied by seven assignments of error. All of them except two have reference to matters of which this court has no jurisdiction. Those two, however, assail the decree on the ground that it violates rights guarantied by the constitution of the United States. As the same points were relied on in the supreme court of the state, it becomes our duty to inquire whether they are well founded. They are as follows: *First.* The supreme court of Pennsylvania erred in sustaining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of rights guarantied to him by article 5 of amendments to the constitution of the United States. *Second.* The supreme court of Pennsylvania erred in sustaining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of rights guarantied to him by article 14, section 1, of the amendments to the constitution of the United States.

§ 695. *The fifth amendment is a restriction on the federal government, the fourteenth on the states.*

As regards the effect of the fifth amendment of the constitution, it has always been held to be a restriction upon the powers of the federal government, and to have no reference to the exercise of such powers by the state governments. See *Withers v. Buckley*, 20 How., 84 (§§ 207-209, *supra*); *Davison v. New Orleans*, 96 U. S., 97 (§§ 701-709, *infra*). We need, therefore, give the first assignment no further consideration. But this is not material, as the provision of section 1, article 14, of the amendments relied on in the second

assignment contains a prohibition on the power of the states in language almost identical with that of the fifth amendment. That language is, that "no state shall . . . deprive any person of life, liberty or property without due process of law."

§ 696. *The general system of procedure for the collection of taxes is "due process of law."*

The main argument for the plaintiff in error — the only one to which we can listen — is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law. It is not asserted that in the methods by which the value of his land was ascertained for the purpose of this taxation there was any departure from the usual modes of assessment, nor that the manner of apportioning and collecting the tax was unusual or materially different from that in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is, and always has been, due process of law. The tax in question was assessed, and the proper officers were proceeding to collect it in this way.

§ 697. *Federal courts cannot correct errors of state courts.*

The distinct ground on which this provision of the constitution of the United States is invoked is, that as the land in question is, and always has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the state tribunals on that subject, that it is only necessary to refer to those decisions without a re-statement of the argument on which they rest. *State Railroad Tax Cases*, 92 U. S., 575; *Kennard v. Louisiana*, id., 480 (§§ 693, 694, *supra*); *Davidson v. New Orleans*, 96 id., 97 (§§ 701-709, *infra*); *Kirtland v. Hotchkiss*, 100 id., 491 (§§ 434-436, *supra*); *Missouri v. Lewis*, 101 id., 22; *National Bank v. Kimball*, 103 id., 732.

§ 698. *A state has power to determine what portions of her territory shall be included within the limits of a city.*

But, passing from the question of the administration of the law of Pennsylvania by her authorities, the argument is that in the matter already mentioned the law itself is in conflict with the constitution. It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a state shall be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether territory shall be governed for local purposes by a county, a city, or a township organization, is one of the most usual and ordinary subjects of state legislation.

§ 699. *So long as taxes are laid for public use, one who is assessed cannot object that his land is outside the city limits and that he receives no benefit from many of the things supported by taxation.*

It is urged, however, with much force, that land of this character, which its owner has not laid off into town lots, but insists on using for agricultural purposes, and through which no streets are run or used, cannot be, even by the legislature, subjected to the taxes of a city,—the water tax, the gas tax, the street tax, and others of similar character. The reason for this is said to be that such taxes are for the benefit of those in a city who own property within the limits of such improvements, and who use or might use them if they choose, while he reaps no such benefit. Cases are cited from the higher courts of Kentucky and Iowa where this principle is asserted, and where those courts have held that farm lands in a city are not subject to the ordinary city taxes. It is no part of our duty to inquire into the grounds on which those courts have so decided. They are questions which arise between the citizens of those states and their own city authorities, and afford no rule for construing the constitution of the United States. We are also referred to the case of *Loan Association v. Topeka*, 20 Wall., 655, which asserts the doctrine that taxation, though sanctioned by state statutes, if it be not for a public use, is an unauthorized taking of private property. We are unable to see that the taxes levied on this property were not for a public use. Taxes for schools, for the support of the poor, for protection against fire and for water-works, are the specific taxes found in the list complained of. We think it will not be denied by any one that these are public purposes in which the whole community have an interest, and for which, by common consent, property owners everywhere in this country are taxed. There are items styled city tax and city buildings, which, in the absence of any explanation, we must suppose to be for the good government of the city, and for the construction of such buildings as are necessary for municipal purposes. Surely these are all public purposes; and the money so to be raised is for public use. No item of the tax assessed against the plaintiff in error is pointed out as intended for any other than a public use.

§ 700. *One is not deprived of his property without due process of law because, by the collection of taxes, there are "hard cases in individual instances."*

It may be true that he does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens, and fairness in their distribution among those who must bear them? We cannot say judicially that Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The water-works will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. Every man in a county, a town, a city or a state is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of public schools to supply to the children of his neighbors and associates, if he has none himself.

The officers whose duty it is to punish and prevent crime are paid out of the taxes. Has he no interest in maintaining them, because he lives further from the court-house and police-station than some others? Clearly, however, these are matters of detail within the discretion, and therefore the power, of the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the tax-payer without due process of law.

These views have heretofore been announced by this court in the cases which we have cited, and in *McMillen v. Anderson*, 95 U. S., 37 (§§ 710-712, *infra*). In *Davidson v. New Orleans* (*supra*) the whole of this subject was very fully considered, and we think it is decisive of the one before us.

*Judgment affirmed.*

DAVIDSON v. NEW ORLEANS.

(6 Otto, 97-108. 1877.)

ERROR to the Supreme Court of Louisiana.

STATEMENT OF FACTS.—The question in this case relates to the validity of certain assessments on real estate for draining swamp lands. The petition was filed in court by the city of New Orleans, setting forth the assessment, and the executrix of the estate of Davidson opposed it. The assessment was approved in the supreme court of the state, and the executrix sued out this writ of error.

Opinion by MR. JUSTICE MILLER.

The objections raised in the state courts to the assessment were numerous and varied, including constitutional objections to the statute under which the assessment was made, and alleged departures from the requirements of the statute itself. And although counsel for the plaintiff in error concede, in the first sentence of their brief, that the only federal question is, whether the judgment is not in violation of that provision of the constitution which declares that "no state shall deprive any person of life, liberty or property without due process of law," the argument seems to suppose that this court can correct any other error which may be found in the record.

1. It is said that the legislature had no right to organize a private corporation to do the work, and, by statute, to fix the price at which the work should be done. 2. That the price so fixed is exorbitant. 3. That there may be a surplus collected under the assessment beyond what is needed for the work, which must in that event go into the city treasury.

Can it be necessary to say that if the work was one which the state had authority to do, and to pay for it by assessments on the property interested, that on such questions of method and detail as these the exercise of the power is not regulated or controlled by the constitution of the United States? Of a similar character is the objection much insisted on, that, under the statute, the assessment is actually made before instead of after the work is done. As a question of wisdom,—of judicious economy,—it would seem better in this, as in other works which require the expenditure of large sums of money, to secure the means of payment before becoming involved in the enterprise; and if this is not due process of law it ought to be.

There are other objections urged by counsel which may be referred to hereafter, but we pause here to consider a moment the clause of the constitution relied on by plaintiff in error. It is part of section 1 of the fourteenth amend-

ment. The section consists of two sentences. The first defines citizenship of the states and of the United States. The next reads as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

The section was the subject of very full and mature consideration in *Slaughter-House Cases*, 16 Wall., 36 (§§ 752-801, *infra*). In those cases, an act of the Louisiana legislature, which had granted to a corporation created for the purpose the exclusive right to erect and maintain a building for the slaughter of live animals within the city, was assailed as being in conflict with this section. The right of the state to use a private corporation and confer upon it the necessary powers to carry into effect sanitary regulations was affirmed, and the decision is applicable to a similar objection in the case now before us. The argument of counsel and the opinion of the court in those cases were mainly directed to that part of the section which related to the privileges and immunities of citizens; and, as the court said in the opinion, the argument was not much pressed, that the statute deprived the butchers of their property without due process of law. The court held that the provision was inapplicable to the case.

§ 701. *Due process of law is law of the land.*

The prohibition against depriving the citizen or subject of his life, liberty or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the constitution of the United States when it became a part of the fourteenth amendment, in the year 1866. The equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guaranties of the rights of the subject against the oppression of the crown. In the series of amendments to the constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the states as further limitations upon the power of the federal government, it is found in the fifth, in connection with other guaranties of personal rights of the same character. Among these are protection against prosecutions for crimes, unless sanctioned by a grand jury; against being twice tried for the same offense; against the accused being compelled, in a criminal case, to testify against himself; and against taking private property for public use without just compensation. Most of these provisions, including the one under consideration, either in terms or in substance, have been embodied in the constitutions of the several states, and in one shape or another have been the subject of judicial construction.

§ 702. *Due process of law not accurately defined.*

It must be confessed, however, that the constitutional meaning or value of the phrase "due process of law" remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guaranties of personal rights found in the constitutions of the several states and of the United States.

§ 703. *A state cannot make anything due process which it chooses to declare such.*

It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor

their property should be disposed of by the crown, except as provided by the law of the land, they meant by "law of the land" the ancient and customary laws of the English people, or laws enacted by the parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the parliament of England. But when, in the year of grace 1866, there is placed in the constitution of the United States a declaration that "no state shall deprive any person of life, liberty or property without due process of law," can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision.

§ 704. *Due process does not imply a regular proceeding in court.*

A most exhaustive judicial inquiry into the meaning of the words "due process of law," as found in the fifth amendment, resulted in the unanimous decision of this court that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. *Murray v. Hoboken Land and Improvement Co.*, 18 How., 272 (§§ 676-689, *supra*). That was an action of ejectment, in which both parties asserted title under Samuel Swartwout: the plaintiff by virtue of an execution, sale and deed, made on a judgment obtained in the regular course of judicial proceedings against him, and the defendant by a seizure and sale by a marshal of the United States, under a distress warrant issued by the solicitor of the treasury, under the act of congress of May 20, 1820. When an account against an officer who held public money had been adjusted by the proper auditing officer of the treasury, and the party who was found indebted neglected or refused to pay, that statute authorized the solicitor of the treasury to issue a distress warrant to the marshal of the proper district, which, from the date of its levy and the record thereof in the district court, should be a lien on the property on which it was levied for the amount due; and the marshal was required to collect the amount, by sale of said property or that of the sureties on his official bond. It was argued that these proceedings deprived Swartwout of his property without due process of law. "The objections," says the court, "raise the questions whether, under the constitution of the United States, a collector of the customs from whom a balance of account has been found to be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the constitution; and, if so, secondly, whether the warrant in question was such due process of law." The court held that the power exercised was executive, and not judicial; and that the issue of the writ, and the proceedings under it, were due process of law within the meaning of the constitution. The history of the English mode of dealing with public debtors and enforcing its revenue laws is reviewed, with the result of showing that the rights of the crown, in these cases, had always been enforced by summary remedies, without the aid of the usual course of judicial proceedings, though the latter were resorted to in the exchequer court,



when the officers of the government deemed it advisable. And it was held that such a course was due process of law within the meaning of that phrase as derived from our ancestors and found in our constitution.

§ 705. *No definition of due process has been given which will apply to every case.*

It is not a little remarkable that, while this provision has been in the constitution of the United States as a restraint upon the authority of the federal government for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the constitution, as a restraint upon the power of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a state to deprive a person of life, liberty or property without due process of law, in terms which would cover every exercise of power thus forbidden to the state, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law. But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the federal government, or limitations imposed upon the states.

§ 706. *Laws for assessment and collection of taxes.*

As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition as applicable to the case before us: That whenever, by the laws of a state or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state, or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

It may violate some provision of the state constitution against unequal taxation; but the federal constitution imposes no restraints on the states in that

regard. If private property be taken for public uses without just compensation, it must be remembered that when the fourteenth amendment was adopted the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a circuit court of the United States, as we were in *Loan Association v. Topeka*, 20 Wall., 655. But however this may be, or under whatever other clause of the federal constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the chief justice, in *Kennard v. Louisiana*, 92 U. S., 480 (§§ 693, 694, *supra*), and, in substance, repeated at the present term in *McMillen v. Anderson*, 95 id., 37 (§§ 710-712, *infra*).

§ 707. *It is due process of law where the fixing of an assessment must be submitted to a court of justice, with notice to owners of the property assessed, and a right granted to contest the assessment.*

This proposition covers the present case. Before the assessment could be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper district court of the state; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown or could not be found. This was complied with; and the party complaining here appeared and had a full and fair hearing in the court of the first instance and afterward in the supreme court. If this be not due process of law, then the words can have no definite meaning as used in the constitution.

§ 708. *The federal constitution does not forbid unequal taxation by the states; nor taxes which do not benefit the person taxed.*

One or more errors assigned, and not mentioned in the earlier part of this opinion, deserve a word or two. It is said that the plaintiff's property had previously been assessed for the same purpose and the assessment paid. If this be meant to deny the right of the state to tax or assess property twice for the same purpose, we know of no provision in the federal constitution which forbids this, or which forbids unequal taxation by the states. If the act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the supreme court of Louisiana in being unable to discover such a contract. It is also said that part of the property of plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere, if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.

§ 709. — *nor the rendering of a personal judgment against the owner of the land.*

And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force — and some highly respectable authorities are cited to support the proposition — that while for such improvements as this a part, or even the whole, of a man's property connected with

the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a state court, or, perhaps, in a circuit court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the federal constitution authorizes us to reverse the judgment of a state court on that question. It is not one which is involved in the phrase "due process of law," and none other is called to our attention in the present case. As there is no error in the judgment of the supreme court of Louisiana of which this court has cognizance, it is affirmed.

## MCMILLEN v. ANDERSON.

(5 Otto, 87-42. 1877.)

ERROR to the Supreme Court of Louisiana.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The defendant, tax collector of the state of Louisiana for the parish of Carroll, seized property of the plaintiff, and was about to sell it for the payment of the license tax of \$100, for which the latter, as a person engaged in business, was liable. In accordance with the laws of Louisiana, plaintiff brought an action in the proper court of the state for the trespass, and in the same action obtained a temporary injunction against the sale of the property seized. Defendant pleaded that the seizure was for taxes due, and that his duty as collector required him to make it. On a full hearing, the court sustained the defense, and gave a judgment under the statute against plaintiff and his sureties on the bond for double the amount of the tax, and for costs. Plaintiff thereupon took an appeal to the supreme court of Louisiana, and in his petition for appeal alleged that the law under which the proceedings of defendant were had is void, because it is in conflict with the constitutions of Louisiana and of the United States, and, as he now argues, is specifically opposed to the provision of the fourteenth amendment of the latter which declares that no state shall deprive any person of life, liberty or property without due process of law.

§ 710. *The validity of a tax is a question for the state court to decide, except when it is claimed to be repugnant to the federal constitution. Due process of law does not mean a judicial proceeding.*

The judgment of the supreme court of Louisiana, to which the present writ of error is directed, affirming that of the inferior court, must be taken as conclusive on all the questions mooted in the record except this one. It must, therefore, be conceded that plaintiff was liable to the tax; that, if the law which authorized the collector to seize the property is valid, his proceedings under it were regular; and that the judgment of the court was sustained by the facts in the case. Looking at the Louisiana statute here assailed—the act of March 14, 1873,—we feel bound to say, that, if it is void on the ground assumed, the revenue laws of nearly all the states will be found void for the same reason. The mode of assessing taxes in the states by the federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal or illegal. It must, under our constitution, be lawfully done. But that does not mean, nor does the phrase "due process of law" mean, by a judicial proceeding. The nation from whom we inherit the phrase "due process of law" has never relied upon the courts of justice for the collection of her taxes, though she passed through

a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision, because in any view that can be taken of it the statute under consideration does not violate it. It enacts that, when any person shall fail or refuse to pay his license tax, the collector shall give ten days' written or printed notice to the delinquent requiring its payment; and the manner of giving this notice is fully prescribed. If at the expiration of this time the license "be not fully paid, the tax collector may, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property" of the delinquent, or so much as may be necessary to pay the tax and costs.

§ 711. *A statute, providing for the collection of a tax otherwise than by suit, is not in violation of the fourteenth amendment of the constitution.*

Another statute declares who is liable to this tax, and fixes the amount of it. The statute here complained of relates only to the manner of its collection. Here is a notice that the party is assessed, by the proper officer, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the states now have boards of revisers of tax assessments does not prove that taxes levied without them are void. Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that state, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money as paid under duress, if the tax was illegal.

§ 712. *A legal remedy is not denied because a party bringing suit and praying an injunction must give security.*

But however that may be, it is quite certain that he can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction. See Fouqua's Code of Practice of Louisiana, arts. 296-309, inclusive. The act of 1874 recognizes this right to an injunction, and regulates the proceedings when issued to stay the collection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction. But it is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the constitution which requires such a bond as a condition precedent to its issue. It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another.

*Judgment affirmed.*

§ 713. The fifth amendment to the constitution of the United States, declaring that "no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation," is a limitation upon the power of the United States and not the state governments. *King v. Wilson*, \* 1 Dill., 555.

§ 714. The fifth and sixth amendments to the constitution are limitations upon the powers of the federal government, and not upon those of the states, and they do not forbid the states to deprive one of his property without due process of law. *Clark v. Dick*, \* 1 Dill., 8.

§ 715. As used in the fourteenth amendment.—The term “due process of law,” used in the fourteenth amendment to the constitution of the United States, means, when applied to judicial proceedings, a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent to pass upon the subject-matter of suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or by his voluntary appearance. *Pennoyer v. Neff*, 5 Otto, 733; *People v. Sponster*,\* 1 Dak. T’y, 297; *Lavin v. Emigrant Industrial Savings Bank*, 18 Blatch., 17.

§ 716. The prohibition of the fourteenth amendment of the constitution of the United States, against a state’s depriving a person of his property without due process of law, extends to all the action of a state through any or all of its departments, legislative, executive or judicial. *Lavin v. Emigrant Industrial Savings Bank*, 18 Blatch., 17.

§ 717. Trial by judges *de facto*.—The constitution of Oregon vested the judicial power of that state in supreme, circuit and county courts, and provided that the circuit courts in each county should be held by the justices of the supreme court. It further provided that when the population of the state should amount to a certain number, the legislature might provide for the election of circuit judges to hold the circuit courts instead of the supreme judges. Such circuit judges were afterwards appointed by act of the legislature, and before one of them holding the circuit court in a county, a citizen was convicted and sentenced to be hanged. It was held that, although the act by which the circuit judges were appointed was unconstitutional and invalid for not finding and declaring that the state possessed the population required by the constitution, and for providing for the appointment instead of the election of the circuit judges, and for other reasons, yet, the prisoner so tried was not for that reason deprived of any rights without due process of law, within the meaning of the fourteenth amendment, as the judge before whom he was tried was an officer *de facto*. *In re Ah Lee*, 6 Saw., 410.

§ 718. Judicial determination that a man is dead.—It is not competent for a state, under the fourteenth amendment to the constitution of the United States, to declare by statute that a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, is conclusive for the purpose of divesting him of his property and of vesting it in an administrator for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever against him, although it is done by process of law against other people, his next of kin, to whom notice is given. *Lavin v. Emigrant Industrial Savings Bank*, 18 Blatch., 24.

§ 719. Taking private property.—Private property cannot be divested by legislative enactment except for public use, and even in such case it cannot be taken without compensation. A law which authorizes the appropriation of property to public use, and prescribes a mode of proceeding by which compensation shall be ascertained and made, is not obnoxious to *Magna Charta*, or its construction in England or in the United States. *Bonaparte v. Camden & Amboy R’y Co.*, Bald., 220.

§ 720. The proceedings for the condemnation of land taken for streets, made by the act of the legislature of Pennsylvania of July 13, 1838, entitled “An act relating to roads, highways and bridges,” are such due process of law as is required by the constitution of the United States for the taking of private property for public use. *Pearson v. Yewdall*, 5 Otto, 296.

§ 721. Prohibitory liquor laws.—*Quære*: Whether a law which forbids the sale of liquor owned at the time the law was passed would be a law depriving a person of his property without due process of law. *Bartemeyer v. Iowa*, 18 Wall., 129 (§§ 802-805).

§ 722. Controlling use of railroad.—An ordinance forbidding a railroad to run its locomotives on a particular street, when the power of control was reserved at the outset, *i. e.*, in permitting the railroad to locate there, is not a taking of property without due process of law. *Railroad Company v. Richmond*, 6 Otto, 521 (§§ 2158-60).

§ 723. Sale to satisfy a state lien.—An act authorizing a sale of lands by commissioners, to satisfy liens held by the state, is not a deprivation of property without due process of law. *Livingston v. Moore*, 7 Pet., 469 (§§ 1835-44).

§ 724. Regulating charges.—When private property is devoted to a public use, it becomes liable to public regulation; and the fixing of rates of charges for the use of such property is not a deprivation of property without due process of law. *Munn v. Illinois*, 4 Otto, 113 (§§ 1349-67).

§ 725. Sale without notice.—Under the act of the state of Maryland of 1880, known as the “oyster law,” providing that the officers shall seize and take into custody the vessel

found violating the provisions of the act, and if, upon trial and conviction, the offenders do not pay the fine imposed upon them within twenty days, the justice shall direct the vessel to be sold after twenty days' notice, a sale of the vessel, without notice to the owners or others interested in her, does not deprive them of their property, without due process of law, contrary to the fourteenth amendment. *The Ann.*, \* 8 Fed. R., 923.

§ 726. **Production of books before supervisor of internal revenue.**—That part of section 9 of the act of congress of July 13, 1836, which empowers a supervisor of internal revenue to compel obedience to a summons issued by him requiring persons to appear before him and testify under oath, and produce their books and papers, by applying to the United States district court for an attachment, is not a violation of the fifth amendment, providing that no person shall be deprived of life, liberty or property without due process of law, and that no person shall be compelled to testify against himself in a criminal case. *In re Meador*, 1 Abb., 317.

§ 727. **Contesting a tax.**—Whenever, by the laws of a state, a tax, assessment or other burden is imposed upon property for public uses, whether it be for the whole state or some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law. *Reclamation District v. Hagar*, \* 6 Saw., 567.

§ 728. **Distress warrant to recover taxes.**—The issuing of a distress warrant, by an officer of the government, against property subject to taxation, for the recovery of taxes due thereon, is an executive process, and is due process of law within the meaning of the constitution. The power of the government by which the property is thus seized is the taxing power. *Mason v. Rollins*, \* 2 Biss., 99.

§ 729. **Distress against delinquent officers.**—The constitutionality of the second section of the act of congress of May 15, 1820, providing that if "any officer who shall have received the public money before it is paid into the treasury of the United States, shall fail to render his account, or pay over the same in the manner or within the time required by law, the amount due shall be certified by the comptroller to the agent of the treasury, who is required to issue a warrant of distress against such delinquent officer and his sureties," is doubted. The warrant is authorized to be issued without notice and without investigation, and the goods of the officer are taken and sold on short notice, and if insufficient, his body is taken and imprisoned. There is no inquiry into the amount which the officer owes, or into the due execution of the bond of the surety. *United States v. Taylor*, \* 3 McL., 539.

## VI. PRIVILEGES AND IMMUNITIES OF CITIZENS.

[Consult sub-titles VII and IX.]

**SUMMARY**—*Constitutional provisions*, § 730.—*Object of the fourteenth amendment*, §§ 731, 734.—*Privileges of citizenship*, §§ 732, 733, 747, 748, 750.—*Power of congress*, § 735.—*What privileges may be granted to corporations*, § 736.—*Exclusive privileges*, §§ 737-739.—*Regulating slaughter-houses*, §§ 738, 739.—*Prohibitory liquor laws*, § 740.—*Citizenship of women; right to vote*, § 741.—*Citizens of a state; privileges of citizens in the several states*, §§ 742, 743.—*Right of women to practice law*, §§ 744, 745.—*Marriage*, § 746.—*Prohibiting non-residents from planting oysters*, § 749.—*Rights in other states; discriminating license laws*, §§ 750, 751.

§ 730. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Const., art. IV, sec. 2. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Fourteenth Amendment, sec. 1. See § 829.

§ 731. The fourteenth amendment contemplated the protection of citizens of the United States and not of the states. *Slaughter-house Cases*, §§ 750-801.

§ 732. The privilege of exercising one's trade, upon which he depends for his support and that of his family, is a privilege of a citizen of a state and not of the United States. *Ibid.*

§ 733. The "privileges and immunities" secured to the citizens of the several states are *fundamental* privileges and immunities which belong of right to the citizens of all free governments. *Ibid.*

§ 784. The effect of the fourteenth amendment was to give the colored people, who had been held not to be citizens of the United States, full rights of citizenship. *Ibid.*

§ 785. Congress may not only control state legislation abridging civil rights already enacted, but may pass laws in advance to carry out the provisions of the fourteenth amendment. *Ibid.*

§ 786. The legislature of a state may confer upon a private corporation the same powers that it can on a municipal corporation already existing. *Ibid.* See § 837.

§ 787. In the absence of constitutional inhibition the legislature of a state can grant any exclusive privileges to any of its citizens or to a corporation. *Ibid.*

§ 788. It is the right of a state to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. *Ibid.* See § 841.

§ 789. An act of a state legislature providing that a certain corporation should have the exclusive privilege of conducting and carrying on the live-stock landing and slaughtering business within certain territorial limits, and that all animals landed within such limits should be landed at the company's landing, and that all animals slaughtered within those limits should be slaughtered at the company's slaughter-house, and limiting the charges to be made by the company, is but a police regulation, grants no exclusive monopoly, subjects no one to "involuntary servitude," deprives no one of the privileges and immunities of citizens of the United States, nor of his "liberty or property without due process of law," nor denies to any person within the jurisdiction of the state the equal protection of the laws. *Ibid.*

§ 740. Laws prohibitory of the liquor traffic do not infringe the fourteenth amendment, nor that constitutional provision guarantying equal immunities to the citizens of the several states. The right to sell liquors is not one of the rights growing out of citizenship of the United States. *Bartemeyer v. Iowa*, §§ 802-805.

§ 741. A woman was a citizen of the United States before the fourteenth amendment; that amendment did not create citizenship. The right of suffrage not being a privilege of women under the constitution prior to that amendment, any restriction subsequent thereto of the right of suffrage to males only, was not in violation thereof. *Minor v. Happersett*, §§ 806-815.

§ 742. One is a citizen of the state wherein he resides. *Bradwell v. The State*, §§ 816-818.

§ 743. The protection designed by the provision of the constitution guarantying the citizens of each state the privileges and immunities of citizens in the several states, has no application to a citizen of the state whose laws are complained of. *Ibid.*

§ 744. This amendment does not confer upon women who are citizens of the United States, and possessing the requisite learning and character, the right of admission to the bar of the state wherein they reside. *Ibid.*

§ 745. It is the prerogative of every state legislature to prescribe regulations for the admission of persons to professions and callings demanding special skill and confidence, and to ordain what offices and positions shall be occupied by men alone. *Ibid.*

§ 746. The incidents attached by the laws of a state to marriage are not "privileges," within the meaning of the constitution, and a law of a state granting to wives married or residing in the state a community interest in the property of their spouses, but giving no such interest to those married and residing in other states, does not violate section 2 of article 4 of the constitution, providing that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." *Conner v. Elliott*, §§ 819, 820. See § 854.

§ 747. The court declines to define the word "privileges," as used in the constitution, deeming it safer, and more in accord with the duty of a judicial tribunal, to leave its meaning to be determined in each case. *Ibid.*

§ 748. No "privileges" are secured by section 2, article 4, of the constitution, except those which belong to citizenship. *Ibid.*

§ 749. A law of a state forbidding persons, not citizens of the state, from planting oysters in the tide-waters of the state, is not a regulation of commerce, nor in violation of the provision of the constitution securing equal privileges and immunities. *McCready v. Virginia*, §§ 821-824. See §§ 842, 1091.

§ 750. The rights of a citizen in another state, as guarantied by article 4, section 2, of the constitution, are, to pass from one state into another to engage in lawful business without molestation; to acquire personal property and real estate; to maintain actions in her courts, and to be exempt from any higher taxes or excises than are imposed by the state upon her own citizens. *Ward v. Maryland*, §§ 825-828.

§ 751. It is one of the privileges of a citizen of one state to pass into another state and sell goods therein subject to no higher tax than that exacted by law of residents of the latter state; and the laws of a state which exact from non-resident traders a license fee greater in

amount than that imposed upon residents of the state, is in conflict with article 4, section 2, of the constitution, which guaranties to the citizens of each state the privileges and immunities of citizens in the several states. *Ibid.*

[NOTES.— See §§ 829-855.]

### SLAUGHTER-HOUSE CASES.

(16 Wallace, 36-130. 1872.)

#### Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.— These cases are brought here by writs of error to the supreme court of the state of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that state.

The cases named on a preceding page, with others which have been brought here and dismissed by agreement, were all decided by the supreme court of Louisiana in favor of the Slaughter-House Company, as we shall hereafter call it for the sake of brevity, and these writs are brought to reverse those decisions. The records were filed in this court in 1870, and were argued before it at length on a motion made by plaintiffs in error for an order in the nature of an injunction or *supersedeas*, pending the action of the court on the merits. The opinion on that motion is reported in 10 Wallace, 273. On account of the importance of the questions involved in these cases they were by permission of the court taken up out of their order on the docket and argued in January, 1872. At that hearing one of the justices was absent, and it was found, on consultation, that there was a diversity of views among those who were present. Impressed with the gravity of the questions raised in the argument, the court, under these circumstances, ordered that the cases be placed on the calendar and reargued before a full bench. This argument was had early in February last.

§ 752. *Motion to dismiss on the ground of an adjustment of the controversy.*

Preliminary to the consideration of those questions is a motion by the defendant to dismiss the cases on the ground that the contest between the parties has been adjusted by an agreement made since the records came into this court, and that part of that agreement is that these writs should be dismissed. This motion was heard with the argument on the merits, and was much pressed by counsel. It is supported by affidavits and by copies of the written agreement relied on. It is sufficient to say of these that we do not find in them satisfactory evidence that the agreement is binding upon all the parties to the record who are named as plaintiffs in the several writs of error, and that there are parties now before the court, in each of the three cases, the names of which appear on a preceding page, who have not consented to their dismissal, and who are not bound by the action of those who have so consented. They have a right to be heard, and the motion to dismiss cannot prevail.

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the state courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the constitution of the United States. The jurisdiction and the duty of this court to review the judgment of the state court on those questions is clear and is imperative. The statute thus assailed as unconstitutional was passed March 8, 1869, and is entitled "An act to protect the health of the



city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company." The first section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter-houses or *abattoirs* within those limits except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition. The second section designates the incorporators, gives the name to the corporation, and confers on it the usual corporate powers. The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stock-yards, stock-landings and slaughter-houses, and imposes upon it the duty of erecting, on or before the 1st day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed. Section 5 orders the closing up of all other stock-landings and slaughter-houses after the 1st day of June, in the parishes of Orleans, Jefferson and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses, under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the state for that purpose. These are the principal features of the statute, and are all that have any bearing upon the questions to be decided by us.

§ 753. *An act requiring butchers to land and slaughter animals at a certain place does not deprive them of fundamental privileges.*

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens — the whole of the butchers of the city — of the right to exercise their trade, the business to which they have been trained, and on which they depend for the support of themselves and their families; and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city. But a critical examination of the act hardly justifies these assertions. It is true that it grants, for the period of twenty-five years, exclusive privileges. And whether those privileges are at the expense of the community, in the sense of a curtailment of any of their fundamental rights, or even in the sense of doing them an injury, is a question open to considerations to be hereafter stated. But it is not true that it deprives the butchers of the right to exercise their trade or imposes upon them any restriction incompatible with its successful pursuit, or furnishing the people of the city with the necessary daily supply of animal food. The act divides itself into two main grants of privilege.—the

one in reference to stock-landings and stock-yards, and the other to slaughter-houses. That the landing of live stock in large droves, from steamboats on the bank of the river and from railroad trains, should, for the safety and comfort of the people and the care of the animals, be limited to proper places, and those not numerous, it needs no argument to prove. Nor can it be injurious to the general community that while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing places, and receiving a fair compensation for the service. It is, however, the slaughter-house privilege which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.

§ 754. *The place where animals may be slaughtered is within the control of the local governing power.*

It is not, and cannot be, successfully controverted that it is both the right and the duty of the legislative body — the supreme power of the state or municipality — to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places *and nowhere else*. The statute under consideration defines these localities, and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the slaughter-house company is required, under a heavy penalty, to permit any person who wishes to do so to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare and to sell his own meats; but he is required to slaughter at a specified place, and to pay a reasonable compensation for the use of the accommodations furnished him at that place. The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service, in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

§ 755. — *the power here exercised is one which has always been conceded to the states.*

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the states, however it may *now* be questioned in some of its details. "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent (2 Commentaries, 340), "be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." This is called the police power; and it is declared by Chief Justice Shaw (*Commonwealth v. Alger*, 7 Cush., 84) that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries or prescribe limits to its exercise. This power is, and must be, from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the

citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. "It extends," says another eminent judge (*Thorpe v. Rutland & Burlington R. Co.*, 27 Vt., 149), "to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state; . . . and persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned." The regulation of the place and manner of conducting the slaughtering of animals and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise.

§ 756. *Cases examined.*

In *Gibbons v. Ogden*, 9 Wheat., 203 (§§ 1183-1201, *infra*), Chief Justice Marshall, speaking of inspection laws passed by the states, says: "They form a portion of that immense mass of legislation which controls everything within the territory of a state not surrendered to the general government—all which can be most advantageously administered by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts. No direct general power over these objects is granted to congress, and consequently they remain subject to state legislation." The exclusive authority of state legislation over this subject is strikingly illustrated in the case of *The City of New York v. Miln*, 11 Pet., 102 (§§ 1274-83, *infra*). In that case the defendant was prosecuted for failing to comply with a statute of New York which required of every master of a vessel arriving from a foreign port in that of New York city, to report the names of all his passengers, with certain particulars of their age, occupation, last place of settlement and place of their birth. It was argued that this act was an invasion of the exclusive right of congress to regulate commerce. And it cannot be denied that such a statute operated at least indirectly upon the commercial intercourse between the citizens of the United States and of foreign countries. But notwithstanding this it was held to be an exercise of the police power, properly within the control of the state, and unaffected by the clause of the constitution which conferred on congress the right to regulate commerce. To the same purpose are the recent cases of *The License Tax*, 5 Wall., 471, and *United States v. De Witt*, 9 id., 41. In the latter case, an act of congress which undertook, as a part of the internal revenue laws, to make it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell oil of petroleum inflammable at less than a prescribed temperature, was held to be void, because, as a police regulation, the power to make such a law belonged to the states, and did not belong to congress.

§ 757. *The legislature may confer upon a private corporation the same powers that it can on a municipal corporation already existing.*

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the con-

venience, health and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges — privileges which it is said constitute a monopoly — the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of *McCulloch v. State of Maryland*, 4 Wheat., 316 (§§ 380–398, *supra*), in relation to the power of congress to organize the Bank of the United States to aid in the fiscal operations of the government.

It can readily be seen that the interested vigilance of the corporation created by the Louisiana legislature will be more efficient in enforcing the limitation prescribed for the stock-landing and slaughtering business for the good of the city than the ordinary efforts of the officers of the law. Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust.

§ 758. *In the absence of constitutional inhibition, a legislature can grant exclusive privileges to any of its citizens or to a corporation.*

The proposition is, therefore, reduced to these terms: Can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a state? The eminent and learned counsel who has twice argued the negative of this question has displayed a research into the history of monopolies in England, and the European continent, only equaled by the eloquence with which they are denounced. But it is to be observed that all such references are to monopolies established by the monarch in derogation of the rights of his subjects, or arise out of transactions in which the people were unrepresented, and their interests uncared for. The great Case of Monopolies, reported by Coke, and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the crown; for whoever doubted the authority of parliament to change or modify the common law? The discussion in the house of commons cited from Macaulay clearly establishes that the contest was between the crown and the people represented in parliament.

But we think it may be safely affirmed that the parliament of Great Britain,

representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges — privileges denied to other citizens — privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good have been made successful by means of these exclusive rights, and could only have been conducted to success in that way. It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that state or in the amendments to the constitution of the United States, adopted since the date of the decisions we have already cited.

§ 759. — *inhibitions in the state constitution are for the state courts.*

If any such restraint is supposed to exist in the constitution of the state, the supreme court of Louisiana having necessarily passed on that question, it would not be open to review in this court. The plaintiffs in error, accepting this issue, allege that the statute is a violation of the constitution of the United States in these several particulars: That it creates an involuntary servitude forbidden by the thirteenth article of amendment; that it abridges the privileges and immunities of citizens of the United States; that it denies to the plaintiffs the equal protection of the laws; and that it deprives them of their property without due process of law, contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles. We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several states to each other and to the citizens of the states and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the federal constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in 1803, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument. The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring

again to the great source of power in this country, the people of the states, for additional guaranties of human rights; additional powers to the federal government; additional restraints upon those of the states. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

§ 760. *The thirteenth amendment was adopted solely for the benefit of the colored race and to secure to them equal rights.*

The institution of African slavery, as it existed in about half the states of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the states in which slavery existed, to separate from the federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery. In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest, these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion. Slavery was at an end wherever the federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

"1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"2. Congress shall have power to enforce this article by appropriate legislation."

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

§ 761. *History of the thirteenth amendment.*

That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid

all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of *habeas corpus* under this article, illustrates this course of observation. *In re Turner*, 1 Abb. (U. S.), 84. And it is all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration.

The process of restoring to their proper relations with the federal government and with the other states those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of congress, developed the fact that, notwithstanding the formal recognition by those states of the abolition of slavery, the condition of the slave race would, without further protection of the federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the states in the legislative bodies which claimed to be in their normal relations with the federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty and property, to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity. They were in some states forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

§ 762. *Origin of the fourteenth amendment.*

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the states which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

§ 763. *Origin of the fifteenth amendment.*

Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments, that, notwithstanding the restraints of those articles on the states, and the laws passed under the additional powers granted to congress, these were inadequate for the protection of life, liberty and property, without which freedom to the slave was no boon. They were in all those states denied the right of suffrage. The

laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage. Hence, the fifteenth amendment, which declares that "the right of a citizen of the United States to vote shall not be denied or abridged by any state on account of race, color or previous condition of servitude." The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every state of the Union.

§ 764. *The obvious purpose of all three amendments was the protection of the colored race.*

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them, as the fifteenth.

§ 765. — *but slavery cannot exist among any race.*

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

§ 766. *The effect of the fourteenth amendment was to give the colored people full rights of citizenship.*

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the states. No such definition was previously found in the constitution, nor had any attempt been made to define it by act of congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in



the territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not, and could not be, a citizen of a state or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made free-men were still not only not citizens, but were incapable of becoming so by anything short of an amendment to the constitution. To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a state, the first clause of the first section was framed. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular state, and it overturns the Dred Scott decision by making *all persons* born within the United States, and subject to its jurisdiction, citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction," was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States.

§ 767. *One may be a citizen of the United States and still not be a citizen of a state.*

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

§ 768. *The fourteenth amendment contemplated the protection of citizens of the United States, and not of the states.*

We think this distinction, and its explicit recognition in this amendment, of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same. The language is, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the *United States*." It is a little remark-

able, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the word citizen of the state should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose. Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the federal constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

§ 769. *The "privileges and immunities" secured to the citizens of the several states are fundamental privileges and immunities which belong of right to the citizens of all free governments.*

The first occurrence of the words "privileges and immunities" in our constitutional history is to be found in the fourth of the articles of the old confederation. It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively." In the constitution of the United States, which superseded the articles of confederation, the corresponding provision is found in section 2 of the fourth article, in the following words: "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the confederation we have some of these specifically mentioned, and enough, perhaps, to give some general idea of the class of civil rights meant by the phrase. Fortunately we are not without judicial construction of this clause of the constitution. The first and the leading case on the subject is that of *Corfield v. Coryell*, decided by Mr. Justice Washington in the circuit court for the district of Pennsylvania in 1823 (4 Wash., 371).

"The inquiry," he says, "is, what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, never-

theless, to such restraints as the government may prescribe for the general good of the whole."

This definition of the privileges and immunities of citizens of the states is adopted in the main by this court in the recent case of *Ward v. Maryland*, 12 Wall., 430 (§§ 825-828, *infra*), while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion they are spoken of as rights belonging to the individual as a citizen of a state. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the state governments were created to establish and secure.

In the case of *Paul v. Virginia*, 8 id., 180 (§§ 1052-59, *infra*), the court, in expounding this clause of the constitution, says that "the privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens." The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of their own citizens. Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

§ 770. *The fourteenth amendment did not bring within the power of congress the entire domain of civil rights theretofore belonging exclusively to the states.*

It would be the vainest show of learning to attempt to prove by citations of authority, that, up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal constitution imposed upon the states — such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states and without that of the federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned from the states to the federal government? And where it is declared that congress shall have the power to enforce that article, was it intended to bring within the power of congress the entire domain of civil rights heretofore belonging exclusively to the states? All this and more must follow if the proposition of the plaintiffs in error be sound.

§ 771. *Congress may pass laws in advance to carry out the provisions of the fourteenth amendment.*

For not only are these rights subject to the control of congress whenever in

its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the supreme court of Louisiana, in these cases, would constitute this court a perpetual censor upon all legislation of the states on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people, the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the congress which proposed these amendments, nor by the legislatures of the states which ratified them.

§ 772. *Privileges of citizens of the state and of the United States.*

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the federal government, its national character, its constitution or its laws. One of these is well described in the case of *Crandall v. State of Nevada*, 6 Wall., 36 (§§ 1269-73, *infra*). It is said to be the right of the citizen of this great country, protected by implied guaranties of its constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices and courts of justice in the several states." And quoting from the language of Chief Justice Taney in another case, it is said "that *for all the great purposes for which the federal government was established, we are one people, with one common country, we are all citizens of the United States;*" and it is as such citizens that their rights are supported in this court in *Crandall v. Nevada*. Another privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citi-

zen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guarantied by the federal constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a state. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a *bona fide* residence therein, with the same rights as other citizens of that state. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

§ 773. *The grant of exclusive privileges to a corporation does not deprive others of their property without due process of law.*

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the constitution since the adoption of the fifth amendment, as a restraint upon the federal power. It is also to be found in some form of expression in the constitutions of nearly all the states, as a restraint upon the power of the states. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the states in this matter in the hands of the federal government. We are not without judicial interpretation, therefore, both state and national, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

§ 774. — *nor does such a grant deny to any person within the jurisdiction of the state the equal protection of the laws.*

"Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. If, however, the states did not conform their laws to its requirements, then by the fifth section of the article of amendment congress was authorized to enforce it by suitable legislation. We doubt very much

whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until congress shall have exercised its power, or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

§ 775. *There is no purpose in the last amendments to destroy the main features of the general system.*

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the national government from those of the state governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this. The adoption of the first eleven amendments to the constitution so soon after the original instrument was accepted shows a prevailing sense of danger at that time from the federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the state organizations to combine and concentrate all the powers of the state, and of contiguous states, for a determined resistance to the general government. Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong national government.

But however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the states with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property,—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states, and to confer additional power on that of the nation. But, whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between state and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the constitution, or of any of its parts.

The judgments of the supreme court of Louisiana in these cases are affirmed. (a)

Dissenting opinion by MR. JUSTICE FIELD.

I am unable to agree with the majority of the court in these cases, and will proceed to state the reasons of my dissent from their judgment. The cases grow out of the act of the legislature of the state of Louisiana, entitled "An

(a) This reverses the ruling in *Slaughter-House Cases*, 1 Abb., 338, and 1 Woods, 21.

act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate 'The Crescent City Live-Stock Landing and Slaughter-House Company,' " which was approved on the 8th of March, 1869, and went into operation on the 1st of June following. The act creates the corporation mentioned in its title, which is composed of seventeen persons designated by name, and invests them and their successors with the powers usually conferred upon corporations in addition to their special and exclusive privileges. It first declares that it shall not be lawful, after the 1st day of June, 1869, to "land, keep or slaughter any cattle, beeves, calves, sheep, swine or other animals, or to have, keep or establish any stock-landing, yards, slaughter-houses or abattoirs within the city of New Orleans or the parishes of Orleans, Jefferson and St. Bernard," except as provided in the act, and imposes a penalty of \$250 for each violation of its provisions. It then authorizes the corporation mentioned to establish and erect within the parish of St. Bernard and the corporate limits of New Orleans, below the United States barracks, on the east side of the Mississippi, or at any point below a designated railroad depot on the west side of the river, "wharves, stables, sheds, yards and buildings, necessary to land, stable, shelter, protect and preserve all kinds of horses, mules, cattle and other animals," and provides that cattle and other animals, destined for sale or slaughter in the city of New Orleans or its environs, shall be landed at the landings and yards of the company, and be there yarded, sheltered and protected, if necessary, and that the company shall be entitled to certain prescribed fees for the use of its wharves, and for each animal landed, and be authorized to detain the animals until the fees are paid, and if not paid within fifteen days to take proceedings for their sale. Every person violating any of these provisions, or landing, yarding or keeping animals elsewhere, is subjected to a fine of \$250.

The act then requires the corporation to erect a grand slaughter-house of sufficient dimensions to accommodate all butchers, and in which five hundred animals may be slaughtered a day, with a sufficient number of sheds and stables for the stock received at the port of New Orleans, at the same time authorizing the company to erect other landing-places and other slaughter-houses at any points consistent with the provisions of the act. The act then provides that when the slaughter-houses and accessory buildings have been completed and thrown open for use, public notice thereof shall be given for thirty days, and within that time "all other stock-landings and slaughter-houses within the parishes of Orleans, Jefferson and St. Bernard shall be closed, and it shall no longer be lawful to slaughter cattle, hogs, calves, sheep or goats, the meat of which is determined [destined] for sale within the parishes aforesaid, under a penalty of \$100 for each and every offense." The act then provides that the company shall receive for every animal slaughtered in its buildings certain prescribed fees, besides the head, feet, gore and entrails of all animals except of swine. Other provisions of the act require the inspection of the animals before they are slaughtered, and allow the construction of railways to facilitate communication with the buildings of the company and the city of New Orleans.

But it is only the special and exclusive privileges conferred by the act that this court has to consider in the cases before it. These privileges are granted for the period of twenty-five years. Their exclusive character not only follows from the provisions I have cited, but it is declared in express terms in the act. In the third section the language is that the corporation "shall have the *sole and exclusive privilege* of conducting and carrying on the live-stock landing

and slaughter-house business within the limits and privileges granted by the provisions of the act." And in the fourth section the language is, that after the 1st of June, 1869, the company shall have "the exclusive privilege of having landed at their landing-places all animals intended for sale or slaughter in the parishes of Orleans and Jefferson," and "the exclusive privilege of having slaughtered" in its slaughter-houses all animals, the meat of which is intended for sale in these parishes.

In order to understand the real character of these special privileges it is necessary to know the extent of country and of population which they affect. The parish of Orleans contains an area of country of one hundred and fifty square miles; the parish of Jefferson, three hundred and eighty-four square miles; and the parish of St. Bernard, six hundred and twenty square miles. The three parishes together contain an area of one thousand, one hundred and fifty-four square miles, and they have a population of between two and three hundred thousand people.

The plaintiffs in error deny the validity of the act in question, so far as it confers the special and exclusive privileges mentioned. The first case before us was brought by an association of butchers in the three parishes against the corporation, to prevent the assertion and enforcement of these privileges. The second case was instituted by the attorney-general of the state, in the name of the state, to protect the corporation in the enjoyment of these privileges, and to prevent an association of stock dealers and butchers from acquiring a tract of land in the same district with the corporation, upon which to erect suitable buildings for receiving, keeping and slaughtering cattle, and preparing animal food for market. The third case was commenced by the corporation itself, to restrain the defendants from carrying on a business similar to its own, in violation of its alleged exclusive privileges.

The substance of the averments of the plaintiffs in error is this: That prior to the passage of the act in question they were engaged in the lawful and necessary business of procuring and bringing to the parishes of Orleans, Jefferson and St. Bernard animals suitable for human food, and in preparing such food for market; that in the prosecution of this business they had provided in these parishes suitable establishments for landing, sheltering, keeping and slaughtering cattle and the sale of meat; that with their association about four hundred persons were connected, and that in the parishes named about a thousand persons were thus engaged in procuring, preparing and selling animal food. And they complain that the business of landing, yarding and keeping, within the parishes named, cattle intended for sale or slaughter, which was lawful for them to pursue before the 1st day of June, 1869, is made by that act unlawful for any one except the corporation named; and that the business of slaughtering cattle and preparing animal food for market, which it was lawful for them to pursue in these parishes before that day, is made by that act unlawful for them to pursue afterwards, except in the buildings of the company, and upon payment of certain prescribed fees, and a surrender of a valuable portion of each animal slaughtered. And they contend that the lawful business of landing, yarding, sheltering and keeping cattle intended for sale or slaughter, which they in common with every individual in the community of the three parishes had a right to follow, cannot be thus taken from them and given over for a period of twenty-five years to the sole and exclusive enjoyment of a corporation of seventeen persons or of anybody else. And they also contend that the lawful and necessary business of slaughtering cattle and preparing animal food for



market, which they and all other individuals had a right to follow, cannot be thus restricted within this territory of one thousand, one hundred and fifty-four square miles to the buildings of this corporation, or be subjected to tribute for the emolument of that body.

No one will deny the abstract justice which lies in the position of the plaintiffs in error; and I shall endeavor to show that the position has some support in the fundamental law of the country.

§ 776. *The police power of the state extends to all regulations affecting the health, good order, morals, peace and safety of society.*

It is contended in justification for the act in question that it was adopted in the interest of the city, to promote its cleanliness and protect its health, and was the legitimate exercise of what is termed the police power of the state. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. All sorts of restrictions and burdens are imposed under it, and when these are not in conflict with any constitutional prohibitions, or fundamental principles, they cannot be successfully assailed in a judicial tribunal. With this power of the state and its legitimate exercise I shall not differ from the majority of the court. But under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen, which the constitution intended to secure against abridgment.

In the law in question there are only two provisions which can properly be called police regulations — the one which requires the landing and slaughtering of animals below the city of New Orleans, and the other which requires the inspection of the animals before they are slaughtered. When these requirements are complied with, the sanitary purposes of the act are accomplished. In all other particulars the act is a mere grant to a corporation created by it of special and exclusive privileges by which the health of the city is in no way promoted. It is plain that if the corporation can, without endangering the health of the public, carry on the business of landing, keeping and slaughtering cattle within a district below the city embracing an area of over a thousand square miles, it would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals. The health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle, but no such object could possibly justify legislation removing such buildings from a large part of the state for the benefit of a single corporation. The pretense of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice.

§ 777. *Grants of exclusive privileges.*

It is also sought to justify the act in question on the same principle that exclusive grants for ferries, bridges and turnpikes are sanctioned. But it can find no support there. Those grants are of franchises of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with

the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others. The grant, with exclusive privileges, of a right thus appertaining to the government, is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual.

Nor is there any analogy between this act of Louisiana and the legislation which confers upon the inventor of a new and useful improvement an exclusive right to make and sell to others his invention. The government in this way only secures to the inventor the temporary enjoyment of that which, without him, would not have existed. It thus only recognizes in the inventor a temporary property in the product of his own brain. The act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively for twenty-five years, for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and there allowed only upon onerous conditions.

If exclusive privileges of this character can be granted to a corporation of seventeen persons, they may, in the discretion of the legislature, be equally granted to a single individual. If they may be granted for twenty-five years they may be equally granted for a century, and in perpetuity. If they may be granted for the landing and keeping of animals intended for sale or slaughter they may be equally granted for the landing and storing of grain and other products of the earth, or for any article of commerce. If they may be granted for structures in which animal food is prepared for market they may be equally granted for structures in which farinaceous or vegetable food is prepared. They may be granted for any of the pursuits of human industry, even in its most simple and common forms. Indeed, upon the theory on which the exclusive privileges granted by the act in question are sustained, there is no monopoly, in the most odious form, which may not be upheld.

§ 778. *The fourteenth amendment was contemplated to protect citizens of the United States against the deprivation of their common rights by legislation.*

The question presented is, therefore, one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent amendments to the federal constitution protect the citizens of the United States against the deprivation of their common rights by state legislation. In my judgment the fourteenth amendment does afford such protection, and was so intended by the congress which framed and the states which adopted it.

The counsel for the plaintiffs in error have contended, with great force, that the act in question is also inhibited by the thirteenth amendment. That amendment prohibits slavery and involuntary servitude, except as a punishment for crime, but I have not supposed it was susceptible of a construction which would cover the enactment in question. I have been so accustomed to regard it as intended to meet that form of slavery which had previously prevailed in this country, and to which the recent civil war owed its existence, that I was not prepared, nor am I yet, to give to it the extent and force ascribed by counsel. Still it is evident that the language of the amendment is not used in a restrictive sense. It is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of

black men is prohibited, and not merely slavery in the strict sense of the term, but involuntary servitude in every form.

§ 779. *The words "involuntary servitude" include all forms of compulsory service for the mere benefit or pleasure of others.*

The words "involuntary servitude" have not been the subject of any judicial or legislative exposition, that I am aware of, in this country, except that which is found in the civil rights act, which will be hereafter noticed. It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of the terms. The abolition of slavery and involuntary servitude was intended to make every one born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. A prohibition to him to pursue certain callings, open to others of the same age, condition and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive, and nearly as great an invasion of his liberty, as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude. The counsel of the plaintiffs in error therefore contend that "wherever a law of a state, or a law of the United States, makes a discrimination between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them to subserve the power, pride, avarice, vanity or vengeance of others," there involuntary servitude exists within the meaning of the thirteenth amendment.

It is not necessary, in my judgment, for the disposition of the present case in favor of the plaintiffs in error, to accept as entirely correct this conclusion of counsel. It, however, finds support in the act of congress known as the Civil Rights Act, which was framed and adopted upon a construction of the thirteenth amendment, giving to its language a similar breadth. That amendment was ratified on the 18th of December, 1865; the proclamation of its ratification was made on that day (13 Stat. at Large, 774); and in April of the following year the Civil Rights Act was passed. 14 id., 27. Its first section declares that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are "citizens of the United States," and that "such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as enjoyed by white citizens." This legislation was supported upon the theory that citizens of the United States, as such, were entitled to the rights and privileges enumer-

ated, and that to deny to any such citizen equality in these rights and privileges with others, was, to the extent of the denial, subjecting him to an involuntary servitude. Senator Trumbull, who drew the act, and who was its earnest advocate in the senate, stated, on opening the discussion upon it in that body, that the measure was intended to give effect to the declaration of the amendment, and to secure to all persons in the United States practical freedom. After referring to several statutes passed in some of the southern states, discriminating between the freedmen and white citizens, and after citing the definition of civil liberty given by Blackstone, the senator said: "I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the constitution is prohibited." Congressional Globe, 1st Session, 39th Congress, part 1, page 474.

§ 780. *An act giving a corporation exclusive privileges within certain limits for the exercise of the trade of slaughtering infringes the fourteenth amendment.*

By the act of Louisiana, within the three parishes named, a territory exceeding one thousand one hundred square miles, and embracing over two hundred thousand people, every man who pursues the business of preparing animal food for market must take his animals to the buildings of the favored company, and must perform his work in them, and for the use of the buildings must pay a prescribed tribute to the company, and leave with it a valuable portion of each animal slaughtered. Every man in these parishes who has a horse or other animal for sale must carry him to the yards and stables of this company, and for their use pay a like tribute. He is not allowed to do his work in his own buildings, or to take his animals to his own stables or keep them in his own yards, even though they should be erected in the same district as the buildings, stables and yards of the company, and that district embraces over eleven hundred square miles. The prohibitions imposed by this act upon butchers and dealers in cattle in these parishes, and the special privileges conferred upon the favored corporation, are similar in principle and as odious in character as the restrictions imposed in the last century upon the peasantry in some parts of France, where, as says a French writer, the peasant was prohibited "to hunt on his own lands, to fish in his own waters, to grind at his own mill, to cook at his own oven, to dry his clothes on his own machines, to whet his instruments at his own grindstone, to make his own wine, his oil, and his cider at his own press, . . . or to sell his commodities at the public market." The exclusive right to all these privileges was vested in the lords of the vicinage. "The history of the most execrable tyranny of ancient times," says the same writer, "offers nothing like this. This category of oppressions cannot be applied to a free man, or to the peasant, except in violation of his rights."

But if the exclusive privileges conferred upon the Louisiana corporation can be sustained, it is not perceived why exclusive privileges for the construction and keeping of ovens, machines, grindstones, wine-presses, and for all the numerous trades and pursuits for the prosecution of which buildings are required, may not be equally bestowed upon other corporations or private individuals, and for periods of indefinite duration.

It is not necessary, however, as I have said, to rest my objections to the act in question upon the terms and meaning of the thirteenth amendment. The provisions of the fourteenth amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us, and inhibit any legis-

lation which confers special and exclusive privileges like these under consideration. The amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the national government. It first declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." It then declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

§ 781. *Who is a citizen of the United States.*

The first clause of this amendment determines who are citizens of the United States, and how their citizenship is created. Before its enactment there was much diversity of opinion among jurists and statesmen whether there was any such citizenship independent of that of the state, and, if any existed, as to the manner in which it originated. With a great number the opinion prevailed that there was no such citizenship independent of the citizenship of the state. Such was the opinion of Mr. Calhoun and the class represented by him. In his celebrated speech in the senate upon the force bill, in 1833, referring to the reliance expressed by a senator upon the fact that we are citizens of the United States, he said: "If by citizen of the United States he means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some state or territory, a sort of citizen of the world, all I have to say is that such a citizen would be a perfect non-descript; that not a single individual of this description can be found in the entire mass of our population. Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some state or territory, and as such, under an express provision of the constitution, is entitled to all privileges and immunities of citizens in the several states; and it is in this and no other sense that we are citizens of the United States." Calhoun's Works, vol. 2, p. 242.

In the *Dred Scott* case this subject of citizenship of the United States was fully and elaborately discussed. The exposition in the opinion of Mr. Justice Curtis has been generally accepted by the profession of the country as the one containing the soundest views of constitutional law. And he held that, under the constitution, citizenship of the United States in reference to natives was dependent upon citizenship in the several states, under their constitutions and laws. The chief justice, in that case, and a majority of the court with him, held that the words "people of the United States" and "citizens" were synonymous terms; that the people of the respective states were the parties to the constitution; that these people consisted of the free inhabitants of those states; that they had provided in their constitution for the adoption of a uniform rule of naturalization; that they and their descendants and persons naturalized were the only persons who could be citizens of the United States, and that it was not in the power of any state to invest any other person with citizenship so that he could enjoy the privileges of a citizen under the constitution, and that therefore the descendants of persons brought to this country and sold as slaves were not, and could not be, citizens within the meaning of the constitution.

The first clause of the fourteenth amendment changes this whole subject,

and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any state or the condition of their ancestry. A citizen of a state is now only a citizen of the United States residing in that state. The fundamental rights, privileges and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any state. The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the state, or city, or town where he resides. They are thus affected in a state by the wisdom of its laws, the ability of its officers, the efficiency of its magistrates, the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the state, or by the residence of the citizen therein. They do not derive their existence from its legislation, and cannot be destroyed by its power.

The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by state legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited congress and the people on its passage. With privileges and immunities thus designated or implied no state could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the constitution and the laws of the United States always controlled any state legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

§ 782. *The "privileges and immunities" of the citizens of the several states defined.*

What, then, are the privileges and immunities which are secured against abridgment by state legislation? In the first section of the Civil Rights Act, congress has given its interpretation to these terms, or at least has stated some of the rights which, in its judgment, these terms include; it has there declared that they include the right "to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." That act, it is true, was passed before the fourteenth amendment, but the amendment was adopted, as I have already said, to obviate objections to the act, or, speaking more accurately, I should say, to obviate objections to legislation of a similar character, extending the protection of the national government over the common rights of all citizens of the United States. Accordingly, after its ratification, congress re-enacted the act under the belief that whatever doubts may have previously existed of

its validity, they were removed by the amendment. May 31, 1870; 16 Stat. at Large, 144.

The terms privileges and immunities are not new in the amendment; they were in the constitution before the amendment was adopted. They are found in the second section of the fourth article, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and they have been the subject of frequent consideration in judicial decisions. In *Corfield v. Coryell*, 4 Wash., 380, Mr. Justice Washington said he had "no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental; which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent and sovereign;" and, in considering what those fundamental privileges were, he said that perhaps it would be more tedious than difficult to enumerate them, but that they might be "all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless to such restraints as the government may justly prescribe for the general good of the whole." This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those *which of right belong to the citizens of all free governments*. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. In the discussions in congress upon the passage of the Civil Rights Act repeated reference was made to this language of Mr. Justice Washington. It was cited by Senator Trumbull with the observation that it enumerated the very rights belonging to a citizen of the United States, set forth in the first section of the act, and with the statement that all persons born in the United States, being declared by the act citizens of the United States, would thenceforth be entitled to the rights of citizens, and that these were the great fundamental rights set forth in the act, and that they were set forth "as appertaining to every freeman."

The privileges and immunities designated in the second section of the fourth article of the constitution are, then, according to the decision cited, those which of right belong to the citizens of all free governments, and they can be enjoyed under that clause by the citizens of each state in the several states upon the same terms, and conditions as they are enjoyed by the citizens of the latter states. No discrimination can be made by one state against the citizens of other states in their enjoyment, nor can any greater imposition be levied than such as is laid upon its own citizens. It is a clause which insures equality in the enjoyment of these rights between citizens of the several states whilst in the same state.

§ 783. *Paul v. Virginia explained.*

Nor is there anything in the opinion in the case of *Paul v. Virginia*, 8 Wall., 168 (§§ 1052-59, *infra*), which at all militates against these views, as is supposed by the majority of the court. The act of Virginia of 1866, which was under consideration in that case, provided that no insurance company, not incorporated under the laws of the state, should carry on its business within the state without previously obtaining a license for that purpose; and that it should not receive such license until it had deposited with the treasurer of the state

bonds of a specified character, to an amount varying from \$30,000 to \$50,000. No such deposit was required of insurance companies incorporated by the state, for carrying on their business within the state; and in the case cited the validity of the discriminating provisions of the statute of Virginia between her own corporations and the corporations of other states was assailed. It was contended that the statute in this particular was in conflict with that clause of the constitution which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." But the court answered that corporations were not citizens within the meaning of this clause; that the term citizens, as there used, applied only to natural persons, members of the body politic owing allegiance to the state, not to artificial persons created by the legislature and possessing only the attributes which the legislature had prescribed; that though it had been held that where contracts or rights of property were to be enforced by or against a corporation, the courts of the United States would, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the state under the laws of which it was created, and to this extent would treat a corporation as a citizen within the provision of the constitution extending the judicial power of the United States to controversies between citizens of different states, it had never been held in any case which had come under its observation, either in the state or federal courts, that a corporation was a citizen within the meaning of the clause in question, entitling the citizens of each state to the privileges and immunities of citizens in the several states. And the court observed that the privileges and immunities secured by that provision were those privileges and immunities which were common to the citizens in the latter states, under their constitution and laws, by virtue of their being citizens; that special privileges enjoyed by citizens in their own states were not secured in other states by the provision; that it was not intended by it to give to the laws of one state any operation in other states; that they could have no such operation except by the permission, expressed or implied, of those states; and that the special privileges which they conferred must, therefore, be enjoyed at home unless the assent of other states to their enjoyment therein were given. And so the court held that a corporation, being a grant of special privileges to the corporators, had no legal existence beyond the limits of the sovereignty where created, and that the recognition of its existence by other states, and the enforcement of its contracts made therein, depended purely upon the assent of those states, which could be granted upon such terms and conditions as those states might think proper to impose.

The whole purport of the decision was that citizens of one state do not carry with them into other states any special privileges or immunities conferred by the laws of their own states of a corporate or other character. That decision has no pertinency to the questions involved in this case. The common privileges and immunities which of right belong to all citizens stand on a very different footing. These the citizens of each state do carry with them into other states, and are secured by the clause in question in their enjoyment upon terms of equality with citizens of the latter states. This equality, in one particular, was enforced by this court in the recent case of *Ward v. Maryland*, reported in 12 Wall., 418 (§§ 825-828, *infra*). A statute of that state required the payment of a larger sum from a non-resident trader for a license to enable him to sell his merchandise in the state than it did of a resident trader, and the court held that the statute, in thus discriminating against the non-resident



trader, contravened the clause securing to the citizens of each state the privileges and immunities of citizens of the several states. The privilege of disposing of his property, which was an essential incident to his ownership, possessed by the non-resident, was subjected by the statute of Maryland to a greater burden than was imposed upon a like privilege of her own citizens. The privileges of the non-resident were in this particular abridged by that legislation.

§ 784. *The general object of the fourteenth amendment.*

What the clause in question did for the protection of the citizens of one state against hostile and discriminating legislation of other states, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different states. If, under the fourth article of the constitution, equality of privileges and immunities is secured between citizens of different states, under the fourteenth amendment the same equality is secured between citizens of the United States.

§ 785. *The power to create a monopoly.*

It will not be pretended that under the fourth article of the constitution any state could create a monopoly in any known trade or manufacture in favor of her own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture monopolized by citizens of other states. She could not confer, for example, upon any of her citizens the sole right to manufacture shoes, or boots, or silk, or the sole right to sell those articles in the state so as to exclude non-resident citizens from engaging in a similar manufacture or sale. The non-resident citizens could claim equality of privilege under the provisions of the fourth article with the citizens of the state exercising the monopoly as well as with others, and thus, as respects them, the monopoly would cease. If this were not so it would be in the power of the state to exclude at any time the citizens of other states from participation in particular branches of commerce or trade, and extend the exclusion from time to time so as effectually to prevent any traffic with them.

Now, what the clause in question does for the protection of citizens of one state against the creation of monopolies in favor of citizens of other states, the fourteenth amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgment in any form by any state. The fourteenth amendment places them under the guardianship of the national authority. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law in the great Case of Monopolies, decided during the reign of Queen Elizabeth.

§ 786. *Monopolies defined. A grant of a monopoly is void.*

A monopoly is defined "to be an institution or allowance from the sovereign power of the state, by grant, commission, or otherwise, to any person or corporation, for the sole buying, selling, making, working or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade." All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void at common law, as destroying the freedom of trade, dis-

couraging labor and industry, restraining persons from getting an honest livelihood, and putting it into the power of the grantees to enhance the price of commodities. The definition embraces, it will be observed, not merely the sole privilege of buying and selling particular articles, or of engaging in their manufacture, but also the sole privilege of using anything by which others may be restrained of the freedom or liberty they previously had in any lawful trade, or hindered in such trade. It thus covers in every particular the possession and use of suitable yards, stables and buildings for keeping and protecting cattle and other animals, and for their slaughter. Such establishments are essential to the free and successful prosecution by any butcher of the lawful trade of preparing animal food for market. The exclusive privilege of supplying such yards, buildings and other conveniences for the prosecution of this business in a large district of country, granted by the act of Louisiana to seventeen persons, is as much a monopoly as though the act had granted to the company the exclusive privilege of buying and selling the animals themselves. It equally restrains the butchers in the freedom and liberty they previously had, and hinders them in their lawful trade.

The reasons given for the judgment in the Case of Monopolies apply with equal force to the case at bar. In that case a patent had been granted to the plaintiff, giving him the sole right to import playing-cards, and the entire traffic in them, and the sole right to make such cards within the realm. The defendant, in disregard of this patent, made and sold some gross of such cards and imported others, and was accordingly sued for infringing upon the exclusive privileges of the plaintiff. As to a portion of the cards made and sold within the realm, he pleaded that he was a haberdasher in London and a free citizen of that city, and as such had a right to make and sell them. The court held the plea good and the grant void, as against the common law and divers acts of parliament. "All trades," said the court, "as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance, to serve the queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is *against the common law and the benefit and liberty of the subject.*" Coke, part 11, p. 86. The case of Davenant and Hurdis was cited in support of this position. In that case a company of merchant tailors in London, having power by charter to make ordinances for the better rule and government of the company, so that they were consonant to law and reason, made an ordinance that any brother of the society who should have any cloth dressed by a cloth-worker, not being a brother of the society, should put one-half of his cloth to some brother of the same society who exercised the art of a cloth-worker, upon pain of forfeiting ten shillings, "and it was adjudged that the ordinance, although it had the countenance of a charter, was against the common law, *because it was against the liberty of the subject; for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what cloth-worker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly*, and, therefore, such ordinance, by color of a charter or any grant by charter to such effect, would be void."

Although the court, in its opinion, refers to the increase in prices and deterioration in quality of commodities which necessarily result from the grant of monopolies, the main ground of the decision was their interference with the liberty of the subject to pursue for his maintenance and that of his family any

lawful trade or employment. This liberty is assumed to be the natural right of every Englishman.

§ 787. *The history of monopolies. Doctrine of the common law.*

The struggle of the English people against monopolies forms one of the most interesting and instructive chapters in their history. It finally ended in the passage of the statute of 21st James I., by which it was declared "that all monopolies and all commissions, grants, licenses, charters and letters-patent, to any person or persons, bodies politic or corporate, whatsoever, of or for the sole buying, selling, making, working or using of anything" within the realm or the dominion of Wales, were altogether contrary to the laws of the realm and utterly void, with the exception of patents for new inventions for a limited period, and for printing, then supposed to belong to the prerogative of the king, and for the preparation and manufacture of certain articles and ordnance intended for the prosecution of war. The common law of England, as is thus seen, condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I., to which I have referred, only embodied the law as it had been previously declared by the courts of England, although frequently disregarded by the sovereigns of that country.

The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, together with the English statutes, and was established here so far as it was applicable to their condition. That law and the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their circumstances, were claimed by the congress of the United Colonies in 1774 as a part of their "indubitable rights and liberties." Journals of Congress, vol. i, pp. 28-30. Of the statutes, the benefits of which were thus claimed, the statute of James I. against monopolies was one of the most important. And when the colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men "with certain inalienable rights, and that among these are life, liberty and the pursuit of happiness; and that to secure these rights governments are instituted among men."

If it be said that the civil law, and not the common law, is the basis of the jurisprudence of Louisiana, I answer that the decree of Louis XVI., in 1776, abolished all monopolies of trades, and all special privileges of corporations, guilds and trading companies, and authorized every person to exercise, without restraint, his art, trade or profession, and such has been the law of France and of her colonies ever since, and that law prevailed in Louisiana at the time of her cession to the United States. Since then, notwithstanding the existence in that state of the civil law as the basis of her jurisprudence, freedom of pursuit has been always recognized as the common right of her citizens. But were this otherwise, the fourteenth amendment secures the like protection to all citizens in that state against any abridgment of their common rights, as in other states. That amendment was intended to give practical effect to the

declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely, under the fourteenth amendment, every citizen of the United States should be able to plead his citizenship of the republic as a protection against any similar invasion of his privileges and immunities.

So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocations of life, been regarded, that few instances have arisen where the principle has been so far violated as to call for the interposition of the courts. But whenever this has occurred, with the exception of the present cases from Louisiana, which are the most bare-faced and flagrant of all, the enactment interfering with the privilege of the citizen has been pronounced illegal and void. When a case under the same law under which the present cases have arisen came before the circuit court of the United States in the district of Louisiana, there was no hesitation on the part of the court in declaring the law, in its exclusive features, to be an invasion of one of the fundamental privileges of the citizen. *Live Stock, etc., Association v. Crescent City, etc., Co.*, 1 Abb., 398. The presiding justice, in delivering the opinion of the court, observed that it might be difficult to enumerate or define what were the essential privileges of a citizen of the United States which a state could not by its laws invade, but that, so far as the question under consideration was concerned, it might be safely said that "it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive and odious monopolies or exclusive privileges which have been condemned by all free governments." And again: "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

§ 788. *Cases examined.*

In *The City of Chicago v. Rumpff*, 45 Ill., 90, which was before the supreme court of Illinois, we have a case similar in all its features to the one at bar. That city being authorized by its charter to regulate and license the slaughtering of animals within its corporate limits, the common council passed what was termed an ordinance in reference thereto, whereby a particular building was designated for the slaughtering of all animals intended for sale or consumption in the city, the owners of which were granted the exclusive right for a specified period to have all such animals slaughtered at their establishment, they to be paid a specific sum for the privilege of slaughtering there by all persons exercising it. The validity of this action of the corporate authorities was assailed on the ground of the grant of exclusive privileges, and the court said: "The charter authorizes the city authorities to license or regulate such establishments. Where that body has made the necessary regulations required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have an opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable and tend to oppression. Or, if they should regard it for the interest of the city that such establishments should be licensed, the ordinance should be so framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the govern-

ment of such business. We regard it neither as a regulation nor a license of the business to confine it to one building or to give it to one individual. Such an action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary, business. Whether we consider this as an ordinance or a contract, it is equally unauthorized, as being opposed to the rules governing the adoption of municipal by-laws. The principle of equality of rights to the corporators is violated by this contract. If the common council may require all of the animals for the consumption of the city to be slaughtered in a single building, or on a particular lot, and the owner be paid a specific sum for the privilege, what would prevent the making a similar contract with some other person that all of the vegetables, or fruits, the flour, the groceries, the dry goods, or other commodities should be sold on his lot and he receive a compensation for the privilege? We can see no difference in principle."

It is true that the court in this opinion was speaking of a municipal ordinance and not of an act of the legislature of a state. But, as it is justly observed by counsel, a legislative body is no more entitled to destroy the equality of rights of citizens, nor to fetter the industry of a city, than a municipal government. These rights are protected from invasion by the fundamental law.

In the case of *The Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn., 19, which was before the supreme court of Connecticut, it appeared that the common council of the city of Norwich had passed a resolution purporting to grant to one Treadway, his heirs and assigns, for the period of fifteen years, the right to lay gas-pipes in the streets of that city, declaring that no other person or corporation should, by the consent of the common council, lay gas-pipes in the streets during that time. The plaintiffs having purchased of Treadway, undertook to assert an exclusive right to use the streets for their purposes, as against another company which was using the streets for the same purposes. And the court said: "As, then, no consideration whatever, either of a public or private character, was reserved for the grant; and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade in respect to which the government has no exclusive prerogative, we think that, so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes can fairly be viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the bill of rights, the first section of which declares 'that no man or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void."

In *The Mayor of City of Hudson v. Thorne*, 7 Paige, 261, an application was made to the chancellor of New York to dissolve an injunction restraining the defendants from erecting a building in the city of Hudson upon a vacant lot owned by them, intended to be used as a hay-press. The common council of the city had passed an ordinance directing that no person should erect, or construct, or cause to be erected or constructed, any wooden or frame barn, stable, or hay-press of certain dimensions, within certain specified limits in the city,

without its permission. It appeared, however, that there were such buildings already in existence, not only in compact parts of the city, but also within the prohibited limits, the occupation of which for the storing and pressing of hay the common council did not intend to restrain. And the chancellor said: "If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power expressly given by their charter to prevent the carrying on of such manufacture; but as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business and prohibit another who has an equal right from pursuing the same business."

In all these cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.

§ 789. *Power to regulate occupations.*

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open, without other restrictions than such as are imposed equally upon all others of the same age, sex and condition. The state may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The fourteenth amendment, in my judgment, makes it essential to the validity of the legislation of every state that this equality of right should be respected. How widely this equality has been departed from, how entirely rejected and trampled upon, by the act of Louisiana, I have already shown. And it is to me a matter of profound regret that its validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and inalienable rights of man, is violated. As stated by the supreme court of Connecticut, in the case cited, grants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal and impartial laws. I am authorized by the CHIEF JUSTICE, MR. JUSTICE SWAYNE, and MR. JUSTICE BRADLEY, to state that they concur with me in this dissenting opinion.

Dissenting opinion by MR. JUSTICE BRADLEY.

I concur in the opinion which has just been read by Mr. Justice Field; but desire to add a few observations for the purpose of more fully illustrating my views on the important question decided in these cases, and the special grounds on which they rest.

The fourteenth amendment to the constitution of the United States, section 1, declares that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. The legislature of

Louisiana, under pretense of making a police regulation for the promotion of the public health, passed an act conferring upon a corporation, created by the act, the exclusive right, for twenty-five years, to have and maintain slaughter-houses, landings for cattle, and yards for confining cattle intended for slaughter, within the parishes of Orleans, Jefferson and St. Bernard, a territory containing nearly twelve hundred square miles, including the city of New Orleans; and prohibiting all other persons from building, keeping or having slaughter-houses, landings for cattle, and yards for confining cattle intended for slaughter, within the said limits; and requiring that all cattle and other animals to be slaughtered for food in that district should be brought to the slaughter-houses and works of the favored company to be slaughtered, and a payment of a fee to the company for such act.

§ 790. *Citizens have a right to pursue lawful employments.*

It is contended that this prohibition abridges the privileges and immunities of citizens of the United States, especially of the plaintiffs in error, who were particularly affected thereby; and whether it does so or not is the simple question in this case. And the solution of this question depends upon the solution of two other questions, to wit: First. Is it one of the rights and privileges of a citizen of the United States to pursue such civil employment as he may choose to adopt, subject to such reasonable regulations as may be prescribed by law? Secondly. Is a monopoly, or exclusive right, given to one person to the exclusion of all others, to keep slaughter-houses, in a district of nearly twelve hundred square miles, for the supply of meat for a large city, a reasonable regulation of that employment which the legislature has a right to impose?

The first of these questions is one of vast importance, and lies at the very foundations of our government. The question is now settled by the fourteenth amendment itself, that citizenship of the United States is the primary citizenship in this country; and that state citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any state he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. And when the spirit of lawlessness, mob violence and sectional hate can be so completely repressed as to give full practical effect to this right, we shall be a happier nation, and a more prosperous one than we now are. Citizenship of the United States ought to be, and, according to the constitution, is, a sure and undoubted title to equal rights in any and every state in this Union, subject to such regulations as the legislature may rightfully prescribe. If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.

Every citizen, then, being primarily a citizen of the United States, and, secondarily, a citizen of the state where he resides, what, in general, are the privileges and immunities of a citizen of the United States? Is the right, liberty or privilege of choosing any lawful employment one of them? If a state legislature should pass a law prohibiting the inhabitants of a particular township, county, or city, from tanning leather or making shoes, would such a law

violate any privileges or immunities of those inhabitants as citizens of the United States, or only their privileges and immunities as citizens of that particular state? Or if a state legislature should pass a law of caste, making all trades and professions, or certain enumerated trades and professions, hereditary, so that no one could follow any such trades or professions except that which was pursued by his father, would such a law violate the privileges and immunities of the people of that state as citizens of the United States, or only as citizens of the state? Would they have no redress but to appeal to the courts of that particular state?

This seems to me to be the essential question before us for consideration. And, in my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of his most valuable rights, and one which the legislature of a state cannot invade, whether restrained by its own constitution or not.

The right of a state to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves. I speak now of the rights of citizens of any free government. Granting for the present that the citizens of one government cannot claim the privileges of citizens in another government; that prior to the union of our North American States the citizens of one state could not claim the privileges of citizens in another state; or, that after the union was formed the citizens of the United States, as such, could not claim the privileges of citizens in any particular state,—yet the citizens of each of the states, and the citizens of the United States, would be entitled to certain privileges and immunities as citizens, at the hands of their own government—privileges and immunities which their own governments respectively would be bound to respect and maintain. In this free country, the people of which inherited certain traditionary rights and privileges from their ancestors, citizenship means something. It has certain privileges and immunities attached to it which the government, whether restricted by express or implied limitations, cannot take away or impair. It may do so temporarily by force, but it cannot do so by right. And these privileges and immunities attach as well to citizenship of the United States as to citizenship of the states.

The people of this country brought with them to its shores the rights of Englishmen; the rights which had been wrested from English sovereigns at various periods of the nation's history. One of these fundamental rights was expressed in these words, found in Magna Charta: "No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him or condemn him but by lawful judgment of his peers or by the law of the land." English constitutional writers expound this article as rendering life, liberty and property inviolable, except by due process of law. This is the very right which the plaintiffs in error claim in this case. Another of these rights was that of *habeas corpus*, or the right of having any invasion of personal liberty judicially examined into at once by a competent judicial magistrate. Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to wit, the right of personal security, the right of personal liberty, and the right of private property. And of the last he says: "The third absolute right, inherent in every Englishman, is that of property, which consists in the



free use, enjoyment and disposal of all his acquisitions, without any control or diminution save only by the laws of the land."

The privileges and immunities of Englishmen were established and secured by long usage and by various acts of parliament. But it may be said that the parliament of England has unlimited authority, and might repeal the laws which have from time to time been enacted. Theoretically this is so, but practically it is not. England has no written constitution, it is true, but it has an unwritten one, resting in the acknowledged, and frequently declared, privileges of parliament and the people, to violate which in any material respect would produce a revolution in an hour. A violation of one of the fundamental principles of that constitution in the colonies, namely, the principle that recognizes the property of the people as their own, and which, therefore, regards all taxes for the support of government as gifts of the people through their representatives, and regards taxation without representation as subversive of free government, was the origin of our own revolution.

This, it is true, was the violation of a political right; but personal rights were deemed equally sacred, and were claimed by the very first congress of the colonies, assembled in 1774, as the undoubted inheritance of the people of this country; and the declaration of independence, which was the first political act of the American people in their independent sovereign capacity, lays the foundation of our national existence upon this broad proposition: "That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." Here again we have the great threefold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty and the pursuit of happiness are equivalent to the rights of life, liberty and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government. For the preservation, exercise and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

§ 791. *Fundamental privileges of citizens discussed.*

I think sufficient has been said to show that citizenship is not an empty name, but that, in this country at least, it has connected with it certain incidental rights, privileges and immunities of the greatest importance. And to say that these rights and immunities attach only to state citizenship, and not to citizenship of the United States, appears to me to evince a very narrow and insufficient estimate of constitutional history and the rights of men, not to say the rights of the American people.

On this point the often-quoted language of Mr. Justice Washington in *Coryell v. Coryell*, 4 Wash., 380, is very instructive. Being called upon to expound that clause in the fourth article of the constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," he says: "The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesita-

tion in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental privileges are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole; the right of a citizen of one state to pass through, or to reside in, any other state for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental."

It is pertinent to observe that both the clause of the constitution referred to, and Justice Washington in his comment on it, speak of the privileges and immunities of citizens *in* a state; not of citizens *of* a state. It is the privileges and immunities of citizens, that is, of citizens as such, that are to be accorded to citizens of other states when they are found in any state; or, as Justice Washington says, "privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments."

It is true the courts have usually regarded the clause referred to as securing only an equality of privileges with the citizens of the state in which the parties are found. Equality before the law is undoubtedly one of the privileges and immunities of every citizen. I am not aware that any case has arisen in which it became necessary to vindicate any other fundamental privilege of citizenship; although rights have been claimed which were not deemed fundamental, and have been rejected as not within the protection of this clause. Be this, however, as it may, the language of the clause is as I have stated it, and seems fairly susceptible of a broader interpretation than that which makes it a guaranty of mere equality of privileges with other citizens.

But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the constitution itself. The constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. The states were merely prohibited from passing bills of attainder, *ex post facto* laws, laws impairing the obligation of contracts, and perhaps one or two more. But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the federal government; such as the right of *habeas corpus*, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of *not being deprived of life, liberty or property without due*

*process of law.* These, and still others, are specified in the original constitution, or in the early amendments of it, as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not.

But even if the constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are. It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens; the privilege of buying, selling and enjoying property; the privilege of engaging in any lawful employment for a livelihood; the privilege of resorting to the laws for redress of injuries, and the like. Their very citizenship conferred these privileges, if they did not possess them before. And these privileges they would enjoy whether they were citizens of any state or not. Inhabitants of federal territories and new citizens, made such by annexation of territory or naturalization, though without any *status* as citizens of a state, could, nevertheless, as citizens of the United States, lay claim to every one of the privileges and immunities which have been enumerated; and among these none is more essential and fundamental than the right to follow such profession or employment as each one may choose, subject only to uniform regulations equally applicable to all.

§ 792. *The grant of a monopoly to a corporation, of keeping slaughter-houses within certain limits, is not a reasonable regulation of that employment.*

II. The next question to be determined in this case is: Is a monopoly or exclusive right, given to one person or corporation to the exclusion of all others, to keep slaughter-houses in a district of nearly twelve hundred square miles, for the supply of meat for a great city, a reasonable regulation of that employment which the legislature has a right to impose? The keeping of a slaughter-house is part of, and incidental to, the trade of a butcher—one of the ordinary occupations of human life. To compel a butcher, or rather all the butchers of a large city and an extensive district, to slaughter their cattle in another person's slaughter-house and pay him a toll therefor, is such a restriction upon the trade as materially to interfere with its prosecution. It is onerous, unreasonable, arbitrary and unjust. It has none of the qualities of a police regulation. If it were really a police regulation it would undoubtedly be within the power of the legislature. That portion of the act which requires all slaughter-houses to be located below the city, and to be subject to inspection, etc., is clearly a police regulation. That portion which allows no one but the favored company to build, own or have slaughter-houses is not a police regulation, and has not the faintest semblance of one. It is one of those arbitrary and unjust laws made in the interest of a few scheming individuals, by which some of the southern states have, within the past few years, been so deplorably oppressed and impoverished. It seems to me strange that it can be viewed in any other light.

§ 793. *The granting of monopolies is an invasion of the rights of others to choose a lawful calling and an infringement of personal liberty.*

The granting of monopolies, or exclusive privileges to individuals or corporations, is an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty. It was so felt by the English nation as far back as the reigns of Elizabeth and James. A fierce struggle for the suppression of such monopolies, and for abolishing the prerogative of creating them, was made and was successful. The statute of 21st James, abolishing monopo-

lies, was one of those constitutional landmarks of English liberty which the English nation so highly prize and so jealously preserve. It was a part of that inheritance which our fathers brought with them. This statute abolished all monopolies except grants for a term of years to the inventors of new manufactures. This exception is the groundwork of patents for new inventions and copyrights of books. These have always been sustained as beneficial to the state. But all other monopolies were abolished as tending to the impoverishment of the people and to interference with their free pursuits. And ever since that struggle no English-speaking people have ever endured such an odious badge of tyranny.

§ 794. *Such a grant cannot be defended on the same grounds that a grant of ferry, railroad or market privileges is upheld.*

It has been suggested that this was a mere legislative act, and that the British parliament, as well as our own legislatures, have frequently disregarded it by granting exclusive privileges for erecting ferries, railroads, markets and other establishments of a public kind. It requires but a slight acquaintance with legal history to know that grants of this kind of franchises are totally different from the monopolies of commodities or of ordinary callings or pursuits. These public franchises can only be exercised under authority from the government, and the government may grant them on such conditions as it sees fit. But even these exclusive privileges are becoming more and more odious, and are getting to be more and more regarded as wrong in principle, and as inimical to the just rights and greatest good of the people. But to cite them as proof of the power of legislatures to create mere monopolies, such as no free and enlightened community any longer endures, appears to me, to say the least, very strange and illogical.

§ 795. *The federal courts can administer relief to citizens of the United States whose privileges are abridged by a state.*

Lastly, can the federal courts administer relief to citizens of the United States whose privileges and immunities have been abridged by a state? Of this I entertain no doubt. Prior to the fourteenth amendment this could not be done, except in a few instances, for the want of the requisite authority. As the great mass of citizens of the United States were also citizens of individual states, many of their general privileges and immunities would be the same in the one capacity as in the other. Having this double citizenship, and the great body of municipal laws intended for the protection of person and property being the laws of the state, and no provision being made and no machinery provided by the constitution, except in a few specified cases, for any interference by the general government between a state and its citizens, the protection of the citizen in the enjoyment of his fundamental privileges and immunities (except where a citizen of one state went into another state) was largely left to state laws and state courts, where they will still continue to be left, unless actually invaded by the unconstitutional acts or delinquency of the state governments themselves.

Admitting, therefore, that formerly the states were not prohibited from infringing any of the fundamental privileges and immunities of citizens of the United States, except in a few specified cases, that cannot be said now, since the adoption of the fourteenth amendment. In my judgment, it was the intention of the people of this country, in adopting that amendment, to provide national security against violation by the states of the fundamental rights of the citizen.

The first section of this amendment, after declaring that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the state wherein they reside, proceeds to declare further that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and that congress shall have power to enforce by appropriate legislation the provisions of this article. Now, here is a clear prohibition on the states against making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States. If my views are correct with regard to what are the privileges and immunities of citizens, it follows conclusively that any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens.

*§ 796. Deprivation of property without due process of law.*

The amendment also prohibits any state from depriving any person (citizen or otherwise) of life, liberty or property without due process of law. In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section. The constitutional question is distinctly raised in these cases; the constitutional right is expressly claimed; it was violated by state law, which was sustained by the state court, and we are called upon in a legitimate and proper way to afford redress. Our jurisdiction and our duty are plain and imperative.

*§ 797. Purposes of the fourteenth amendment.*

It is futile to argue that none but persons of the African race are intended to be benefited by this amendment. They may have been the primary cause of the amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed. The mischief to be remedied was not merely slavery and its incidents and consequences, but that spirit of insubordination and disloyalty to the national government which had troubled the country for so many years in some of the states, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong national yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.

But great fears are expressed that this construction of the amendment will lead to enactments by congress interfering with the internal affairs of the states, and establishing therein civil and criminal codes of law for the government of the citizens, and thus abolishing the state governments in everything but name; or else that it will lead the federal courts to draw to their cognizance the supervision of state tribunals on every subject of judicial inquiry, on the plea of ascertaining whether the privileges and immunities of citizens have

not been abridged. In my judgment no such practical inconveniences would arise. Very little, if any, legislation on the part of congress would be required to carry the amendment into effect. Like the prohibition against passing a law impairing the obligation of a contract, it would execute itself. The point would be regularly raised in a suit at law, and settled by final reference to the federal court. As the privileges and immunities protected are only those fundamental ones which belong to every citizen, they would soon become so far defined as to cause but a slight accumulation of business in the federal courts. Besides, the recognized existence of the law would prevent its frequent violation. But even if the business of the national courts should be increased, congress could easily supply the remedy by increasing their number and efficiency. The great question is: What is the true construction of the amendment? When once we find that, we shall find the means of giving it effect. The argument from inconvenience ought not to have a very controlling influence in questions of this sort. The national will and national interest are of far greater importance.

In my opinion the judgment of the supreme court of Louisiana ought to be reversed.

Dissenting opinion by MR. JUSTICE SWAYNE.

I concur in the dissent in these cases and in the views expressed by my brethren Mr. Justice Field and Mr. Justice Bradley. I desire, however, to submit a few additional remarks.

§ 798. *The history and objects of all the amendments.*

The first eleven amendments to the constitution were intended to be checks and limitations upon the government which that instrument called into existence. They had their origin in a spirit of jealousy on the part of the states which existed when the constitution was adopted. The first ten were proposed in 1789 by the first congress at its first session after the organization of the government. The eleventh was proposed in 1794, and the twelfth in 1803. The one last mentioned regulates the mode of electing the president and vice-president. It neither increased nor diminished the power of the general government, and may be said in that respect to occupy neutral ground. No further amendments were made until 1865, a period of more than sixty years. The thirteenth amendment was proposed by congress on the 1st of February, 1865, the fourteenth on the 16th of June, 1866, and the fifteenth on the 27th of February, 1869. These amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the states, and deeply affect those bodies. They are in this respect at the opposite pole from the first eleven. *Barron v. Mayor and City Council of Baltimore*, 7 Pet., 243; *Livingston v. Moore*, id., 551; *Fox v. State of Ohio*, 5 How., 429 (§§ 496-500, *supra*); *Smith v. State of Maryland*, 18 id., 71; *Pervear v. Commonwealth*, 5 Wall., 476; *Twitchell v. Commonwealth*, 7 id., 321.

Fairly construed, these amendments may be said to rise to the dignity of a new Magna Charta. The thirteenth blotted out slavery, and forbade forever its restoration. It struck the fetters from four millions of human beings, and raised them at once to the sphere of freemen. This was an act of grace and justice performed by the nation. Before the war it could have been done only by the states where the institution existed, acting severally and separately

from each other. The power then rested wholly with them. In that way, apparently, such a result could never have occurred. The power of congress did not extend to the subject, except in the territories.

The fourteenth amendment consists of five sections. The first is as follows: "All persons born or naturalized within the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The fifth section declares that congress shall have power to enforce the provisions of this amendment by appropriate legislation.

The fifteenth amendment declares that the right to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude. Until this amendment was adopted, the subject to which it relates was wholly within the jurisdiction of the states. The general government was excluded from participation.

The first section of the fourteenth amendment is alone involved in the consideration of these cases. No searching analysis is necessary to eliminate its meaning. Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established signification. There is no room for construction. There is nothing to construe. Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out. (1) Citizens of the states and of the United States are defined. (2) It is declared that no state shall, by law, abridge the privileges or immunities of citizens of the United States. (3) That no state shall deprive *any person*, whether a citizen or not, of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§ 799. *Citizenship considered.*

A citizen of a state is *ipso facto* a citizen of the United States. No one can be the former without being also the latter; but the latter, by losing his residence in one state without acquiring it in another, although he continues to be the latter, ceases for the time to be the former. "The privileges and immunities" of a citizen of the United States include, among other things, the fundamental rights of life, liberty and property, and also the rights which pertain to him by reason of his membership of the nation. The citizen of a state has the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the state, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection. All those which belong to the citizen of a state, except as to bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts (Constitution of U. S., art. I, sec. 10), are left to the guardianship of the bills of rights, constitutions, and laws of the states respectively. Those rights may all be enjoyed in every state by the citizens of every other state by virtue of clause 2, section 4, article 1, of the constitution of the United States as it was originally framed. This section does not in anywise affect them; such was not its purpose.

§ 800. *Constitutional guaranties of the rights of persons and citizens.*

In the next category, obviously *ex industria*, to prevent, as far as may be, the possibility of misinterpretation, either as to persons or things, the phrases "citizens of the United States" and "privileges and immunities" are dropped, and more simple and comprehensive terms are substituted. The substitutes are "any person," and "life," "liberty," and "property," and "the equal protection of the laws." Life, liberty and property are forbidden to be taken "without due process of law," and "equal protection of the laws" is guarantied to all. Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity. "Due process of law" is the application of the law as it exists in the fair and regular course of administrative procedure. "The equal protection of the laws" places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty and property, and the pursuit of happiness. *Corfield v. Coryell*, 4 Wash., 380; *Lemmon v. People*, 26 Barb., 274, and 20 N. Y., 626; *Conner v. Elliott*, 18 How., 593 (§§ 819, 820, *infra*); *Murray v. McCarthy*, 2 Mumf., 399; *Campbell v. Morris*, 3 Har. & McH., 554; *Towle's Case*, 5 Leigh, 748; *State v. Medbury*, 3 R. I., 142; 1 Tucker's Blackstone, 145; 1 Cooley's Blackstone, 125, 128.

It is admitted that the plaintiffs in error are citizens of the United States, and persons within the jurisdiction of Louisiana. The cases before us, therefore, present but two questions. (1) Does the act of the legislature creating the monopoly in question abridge the privileges and immunities of the plaintiffs in error as citizens of the United States? (2) Does it deprive them of liberty or property without due process of law, or deny them the equal protection of the laws of the state, they being *persons* "within its jurisdiction?"

Both these inquiries I remit for their answer as to the facts to the opinions of my brethren, Mr. Justice Field and Mr. Justice Bradley. They are full and conclusive upon the subject. A more flagrant and indefensible invasion of the rights of many for the benefit of a few has not occurred in the legislative history of the country. The response to both inquiries should be in the affirmative. In my opinion the cases, as presented in the record, are clearly within the letter and meaning of both the negative categories of the sixth section. The judgments before us should, therefore, be reversed.

§ 801. *Meaning of "person" and "citizen" in the fourteenth amendment.*

These amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members. The provisions of this section are all eminently conservative in their character. They are a bulwark of defense, and can never be made an engine of oppression. The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language "citizens of



the United States" was meant *all* such citizens; and by "any person" was meant *all* persons within the jurisdiction of the state. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes and conditions of men. It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted. The power is beneficent in its nature and cannot be abused. It is such as should exist in every well-ordered system of polity. Where could it be more appropriately lodged than in the hands to which it is confided? It is necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority any government claiming to be national is glaringly defective. The construction adopted by the majority of my brethren is, in my judgment, much too narrow. It defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted. To the extent of that limitation it turns, as it were, what was meant for bread into a stone. By the constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the states. That want was intended to be supplied by this amendment. Against the former this court has been called upon more than once to interpose. Authority of the same amplitude was intended to be conferred as to the latter. But this arm of our jurisdiction is, in these cases, stricken down by the judgment just given. Nowhere, than in this court, ought the will of the nation, as thus expressed, to be more liberally construed or more cordially executed. This determination of the majority seems to me to lie far in the other direction.

I earnestly hope that the consequences to follow may prove less serious and far-reaching than the minority fear they will be.

#### BARTEMEYER v. IOWA.

(18 Wallace, 129-141. 1873.)

ERROR to the Supreme Court of Iowa.

STATEMENT OF FACTS.—Bartemeyer was prosecuted for selling liquor in violation of the prohibitory liquor law of Iowa of 1851. He admitted the selling of one glass of whisky to one Hickey, but averred that he owned that particular glass of whisky prior to the enactment of the law. The case was submitted on the plea, without evidence, and the defendant was found guilty.

§ 802. *Prior to the fourteenth amendment, state laws prohibiting the liquor traffic were constitutional.*

Opinion by MR. JUSTICE MILLER.

The case has been submitted to us on printed argument. That on the part of the plaintiff in error has taken a very wide range, and is largely composed of the arguments familiar to all, against the right of the states to regulate traffic in intoxicating liquors. So far as this argument deals with the mere question of regulating this traffic, or even its total prohibition, as it may have been affected by anything in the federal constitution prior to the recent amend-

ments of that instrument, we do not propose to enter into a discussion. Up to that time it had been considered as falling within the police regulations of the states, left to their judgment, and subject to no other limitations than such as were imposed by the state constitution, or by the general principles supposed to limit all legislative power. It has never been seriously contended that such laws raised any question growing out of the constitution of the United States.

§ 803. *The fourteenth amendment is not intended to protect the liquor traffic.*

But the case before us is supposed by counsel of the plaintiff in error to present a violation of the fourteenth amendment of the constitution, on the ground that the act of the Iowa legislature is a violation of the privileges and immunities of citizens of the United States which that amendment declares shall not be abridged by the states; and that in his case it deprives him of his property without due process of law. As regards both branches of this defense, it is to be observed that the statute of Iowa which is complained of was in existence long before the amendment of the federal constitution, which is thus invoked to render it invalid. Whatever were the privileges and immunities of Mr. Bartemeyer, as they stood before that amendment, under the Iowa statute, they have certainly not been abridged by any action of the state legislature since that amendment became a part of the constitution. And unless that amendment confers privileges and immunities which he did not previously possess, the argument fails. But the most liberal advocate of the rights conferred by that amendment have contended for nothing more than that the rights of the citizen previously existing, and dependent wholly on state laws for their recognition, are now placed under the protection of the federal government, and are secured by the federal constitution. The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent state legislatures from regulating and even *prohibiting* the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of *Wynehamer v. People*, 3 Kern., 486, has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a state or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the *Slaughter-House Cases*, 16 Wall., 36 (§§ 752-801, *supra*).

§ 804. *Quære: Whether the fourteenth amendment is to be construed so as to render invalid a prohibition law, in so far as it affects liquor owned prior to its passage.*

But if it were true, and it was fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey, at the time that the state of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: 1. Whether this would be a statute depriving him of his property without due process of law; and secondly, whether, if it were so, it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this court? Both of these questions, whenever they may be presented to us, are of an importance to require the most careful and seri-

ous consideration. They are not to be lightly treated, nor are we authorized to make any advances to meet them until we are required to do so by the duties of our position. In the case before us the supreme court of Iowa, whose judgment we are called on to review, did not consider it. They said that the record did not present it.

§ 805. *Pleading construed against the pleader.*

It is true the bill of exceptions, as it seems to us, does show that the defendant's plea was all the evidence given, but this does not remove the difficulty in our minds. The plea states that the defendant was the owner of the glass of liquor sold prior to the passage of the law under which the proceedings against him were instituted, being chapter 64 of the revision of 1860. If this is to be treated as an allegation that the defendant was the owner of that glass of liquor prior to 1860, it is insufficient, because the revision of the laws of Iowa of 1860 was not an enactment of new laws, but a revision of those previously enacted; and there has been in existence in the state of Iowa, ever since the code of 1851, a law strictly prohibiting the sale of such liquors; the act, in all essential particulars, under which the defendant was prosecuted, amended in some immaterial points. If it is supposed that the averment is helped by the statement that he owned the liquor before the law was passed, the answer is that this is a mere conclusion of law. He should have stated when he became the owner of the liquor, or at least have fixed a date, when he did own it, and leave the court to decide when the law took effect, and apply it to his case. But the plea itself is merely argumentative, and does not state the ownership as a fact, but says he is not guilty of any offense, because of such fact.

If it be said that this manner of looking at the case is narrow and technical, we answer that the record affords to us on its face the strongest reason to believe that it has been prepared from the beginning for the purpose of obtaining the opinion of this court on important constitutional questions without the actual existence of the facts on which such questions can alone arise. It is absurd to suppose that the plaintiff, an ordinary retailer of drinks, could have proved, if required, that he had owned that particular glass of whisky prior to the prohibitory liquor law of 1851.

The defendant, from his first appearance before the justice of the peace to his final argument in the supreme court, asserted in the record in various forms that the statute under which he was prosecuted was a violation of the constitution of the United States. The act of the prosecuting attorney, under these circumstances, in going to trial without any replication or denial of the plea, which was intended manifestly to raise that question, but which carried on its face the strongest probability of its falsehood, satisfies us that a moot case was deliberately made up to raise the particular point, when the *real* facts of the case would not have done so. As the supreme court of Iowa did not consider this question as raised by the record, and passed no opinion on it, we do not feel at liberty, under all the circumstances, to pass on it on this record.

The other errors assigned being found not to exist, the judgment of the supreme court of Iowa is affirmed.

Concurring opinion by MR. JUSTICE BRADLEY.

Whilst I concur in the conclusion to which the court has arrived in this case, I think it proper to state briefly and explicitly the grounds on which I distinguish it from the Slaughter-House Cases, which were argued at the same time.

I prefer to do this in order that there may be no misapprehension of the views which I entertain in regard to the application of the fourteenth amendment to the constitution.

This was a prosecution for selling intoxicating liquor in Iowa, contrary to a law of that state which prohibits the sale of such liquor. The defendant pleaded that he was the lawful owner of the liquor in Iowa and a citizen of the United States prior to the day on which the law was passed, being chapter 64 of the revision of 1860. Judgment was given against the defendant on his plea. The truth is, that the law in question was originally passed in 1851, and was incorporated into the revision of 1860, in the chapter referred to in the plea. Whether the plea meant to assert that the defendant owned the liquor prior to the passage of the original law, or only prior to its re-enactment in the revision, is doubtful, and, being doubtful, it must be interpreted most strongly against the pleader. It amounts, therefore, only to an allegation that the defendant became owner of the liquor at a time when it was unlawful to sell it in Iowa. The law, therefore, was not in this case an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law does not arise. No one has ever doubted that a legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. When such rights stand in the way of the public good they can be removed by awarding compensation to the owner. When they are not in question, the claim of a right to sell a prohibited article can never be deemed one of the privileges and immunities of the citizen. It is *toto casu* different from the right not to be deprived of property without due process of law, or the right to pursue such lawful avocation as a man chooses to adopt, unrestricted by tyrannical and corrupt monopolies. By that portion of the fourteenth amendment by which no state may make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, or take life, liberty or property without due process of law, it has now become the fundamental law of this country that life, liberty and property (which include "the pursuit of happiness") are sacred rights, which the constitution of the United States guaranties to its humblest citizen against oppressive legislation, whether national or local, so that he cannot be deprived of them without due process of law. The monopoly created by the legislature of Louisiana, which was under consideration in the Slaughter-House Cases, was, in my judgment, legislation of this sort and obnoxious to this objection. But police regulations, intended for the preservation of the public health and the public order, are of an entirely different character. So much of the Louisiana law as partook of this character was never objected to. It was the unconscionable monopoly, of which the police regulation was a mere pretext, that was deemed by the dissenting members of the court an invasion of the right of the citizen to pursue his lawful calling. A claim of right to pursue an unlawful calling stands on very different grounds, occupying the same platform as does a claim of right to disregard license laws and to usurp public franchises. It is greatly to be regretted, as it seems to me, that this distinction was lost sight of (as I think it was) in the decision of the court referred to.

I am authorized to say that JUSTICES SWAYNE and FIELD concur in this opinion.

## MINOR v. HAPPERSETT.

(21 Wallace, 162-178. 1874.)

ERROR to the Supreme Court of Missouri.

STATEMENT OF FACTS.— Mrs. Virginia Minor, a free, native born, white citizen of the United States, and of the state of Missouri, over twenty-one years of age, sued Happersett, a registrar of voters, for refusing to place her name upon the list of registered voters.

Opinion by WAITE, C. J.

The question is presented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and of the state of Missouri, is a voter in that state, notwithstanding the provision of the constitution and laws of the state, which confine the right of suffrage to men alone. We might, perhaps, decide the case upon other grounds, but this question is fairly made. From the opinion we find that it was the only one decided in the court below, and it is the only one which has been argued here. The case was undoubtedly brought to this court for the sole purpose of having that question decided by us, and in view of the evident propriety there is of having it settled, so far as it can be by such a decision, we have concluded to waive all other considerations and proceed at once to its determination. It is contended that the provisions of the constitution and laws of the state of Missouri which confine the right of suffrage and registration therefor to men are in violation of the constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States, and subject to the jurisdiction thereof, is a citizen of the United States and of the state in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the state cannot by its laws or constitution abridge.

§ 806. *Women were citizens prior to the fourteenth amendment.*

There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment "all persons born or naturalized in the United States, and subject to the jurisdiction thereof," are expressly declared to be "citizens of the United States and of the state wherein they reside." But, in our opinion, it did not need this amendment to give them that position. Before its adoption the constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several states, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

§ 807. *Who are citizens of the United States.*

For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant" and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the descrip-

tion of one living under a republican government, it was adopted by nearly all of the states upon their separation from Great Britain, and was afterwards adopted in the articles of confederation and in the constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.

To determine, then, who were citizens of the United States before the adoption of the amendment, it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership. Looking at the constitution itself we find that it was ordained and established by "the people of the United States" (Preamble, 1 Stat. at Large, 10), and then going further back, we find that these were the people of the several states that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth (Declaration of Independence, id., 1), and that had by articles of confederation and perpetual union, in which they took the name of "The United States of America," entered into a firm league of friendship with each other for their common defense, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attack made upon, them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever. Articles of Confederation, § 3; 1 Stat. at Large, 4.

Whoever, then, was one of the people of either of these states when the constitution of the United States was adopted, became *ipso facto* a citizen — a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were. Additions might always be made to the citizenship of the United States in two ways: first, by birth; and second, by naturalization. This is apparent from the constitution itself, for it provides (article 2, § 1) that "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the constitution, shall be eligible to the office of president" (article 1, § 8), and that congress shall have power "to establish a uniform rule of naturalization." Thus new citizens may be born, or they may be created by naturalization.

The constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction, without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. The words "all children" are certainly as comprehensive, when used in this connection, as "all persons," and if females are included in the last they must be in the first. That they are included in the last is not denied. In fact the whole argument of the plaintiffs proceeds upon that idea.

Under the power to adopt a uniform system of naturalization, congress, as early as 1790, provided "that any alien, being a free white person," might be admitted as a citizen of the United States, and that the children of such persons so naturalized, dwelling within the United States, being under twenty-one years of age at the time of such naturalization, should also be considered citizens of the United States, and that the children of citizens of the United States that might be born beyond the sea, or out of the limits of the United States, should be considered as natural-born citizens. 1 Stat. at Large, 103. These provisions thus enacted have, in substance, been retained in all the naturalization laws adopted since. In 1855, however, the last provision was somewhat extended, and all persons theretofore born, or thereafter to be born, out of the limits of the jurisdiction of the United States, whose fathers were, or should be at the time of their birth, citizens of the United States, were declared to be citizens also. 10 id., 604.

As early as 1804 it was enacted by congress that when any alien who had declared his intention to become a citizen, in the manner provided by law, died before he was actually naturalized, his widow and children should be considered as citizens of the United States, and entitled to all rights and privileges as such upon taking the necessary oath (2 id., 293); and in 1855 it was further provided that any woman who might lawfully be naturalized under the existing laws, married, or who should be married to a citizen of the United States, should be deemed and taken to be a citizen. 10 Stat. at Large, 604. From this it is apparent that from the commencement of the legislation upon this subject alien women and alien minors could be made citizens by naturalization, and we think it will not be contended that this would have been done if it had not been supposed that native women and native minors were already citizens by birth.

§ 808. *The fourteenth amendment did not affect the citizenship of women.*

But if more is necessary to show that women have always been considered as citizens the same as men, abundant proof is to be found in the legislative and judicial history of the country. Thus, by the constitution, the judicial power of the United States is made to extend to controversies between citizens of different states. Under this it has been uniformly held that the citizenship necessary to give the courts of the United States jurisdiction of a cause must be affirmatively shown on the record. Its existence as a fact may be put in issue and tried. If found not to exist the case must be dismissed. Notwithstanding this the records of the courts are full of cases in which the jurisdiction depends upon the citizenship of women, and not one can be found, we think, in which objection was made on that account. Certainly none can be found in which it has been held that women could not sue or be sued in the courts of the United States. Again, at the time of the adoption of the constitution, in many of the states (and in some probably now) aliens could not inherit or transmit inheritance. There are a multitude of cases to be found in which the question has been presented whether a woman was or was not an alien, and as such capable or incapable of inheritance, but in no one has it been insisted that she was not a citizen because she was a woman. On the contrary, her right to citizenship has been in all cases assumed. The only question has been whether, in the particular case under consideration, she had availed herself of the right.

In the legislative department of the government similar proof will be found. Thus, in the pre-emption laws (5 Stat. at Large, 455, § 10), a widow, "being a citizen of the United States," is allowed to make settlement on the public lands

and purchase upon the terms specified, and women, "being citizens of the United States," are permitted to avail themselves of the benefit of the homestead law. 12 id., 392. Other proof of like character might be found, but certainly more cannot be necessary to establish the fact that sex has never been made one of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The amendment prohibited the state, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption.

§ 809. *The right of suffrage is not one of the privileges of citizenship.*

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters. The constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them. It certainly is nowhere made so in express terms. The United States has no voters in the states of its own creation. The elective officers of the United States are all elected directly or indirectly by state voters. The members of the house of representatives are to be chosen by the people of the states, and the electors in each state must have the qualifications requisite for electors of the most numerous branch of the state legislature. Constitution, article 1, § 2. Senators are to be chosen by the legislatures of the states, and necessarily the members of the legislature required to make the choice are elected by the voters of the state. Id., article 1, § 3. Each state must appoint, in such manner as the legislature thereof may direct, the electors to elect the president and vice-president. Id., article 2, § 2. The times, places and manner of holding elections for senators and representatives are to be prescribed in each state by the legislature thereof; but congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators. Id., article 1, § 4. It is not necessary to inquire whether this power of supervision thus given to congress is sufficient to authorize any interference with the state laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the state in this particular is certainly supreme until congress acts.

§ 810. *The fourteenth amendment was merely a guaranty of whatever protection the citizen already had.*

The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the states, but it operates for this purpose, if at all, through the states and the state laws, and not directly upon the citizen.

§ 811. *Right of suffrage when the constitution was adopted.*

It is clear, therefore, we think, that the constitution has not added the right



of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was co-extensive with the citizenship of the states at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

When the federal constitution was adopted, all the states, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the crown. Upon an examination of those constitutions we find that in no state were all citizens permitted to vote. Each state determined for itself who should have that power. Thus, in New Hampshire, "every male inhabitant of each town and parish with town privileges, and places unincorporated in the state, of twenty-one years of age and upwards, excepting paupers and persons excused from paying taxes at their own request," were its voters; in Massachusetts "every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the commonwealth of the annual income of three pounds, or any estate of the value of sixty pounds;" in Rhode Island "such as are admitted free of the company and society" of the colony; in Connecticut such persons as had "maturity in years, quiet and peaceable behavior, a civil conversation, and forty shillings freehold or forty pounds personal estate," if so certified by the selectmen; in New York "every male inhabitant of full age who shall have personally resided within one of the counties of the state for six months immediately preceding the day of election, . . . if during the time aforesaid he shall have been a freeholder, possessing a freehold of the value of twenty pounds within the county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to the state;" in New Jersey "all inhabitants . . . of full age who are worth fifty pounds, proclamation-money, clear estate in the same, and have resided in the county in which they claim a vote for twelve months immediately preceding the election;" in Pennsylvania "every freeman of the age of twenty-one years, having resided in the state two years next before the election, and within that time paid a state or county tax which shall have been assessed at least six months before the election;" in Delaware and Virginia "as exercised by law at present;" in Maryland "all freemen above twenty-one years of age having a freehold of fifty acres of land in the county in which they offer to vote and residing therein, and all freemen having property in the state above the value of thirty pounds current money, and having resided in the county in which they offer to vote one whole year next preceding the election;" in North Carolina, for senators, "all freemen of the age of twenty-one years who have been inhabitants of any one county within the state twelve months immediately preceding the day of election, and possessed of a freehold within the same county of fifty acres of land for six months next before and at the day of election;" and for members of the house of commons, "all freemen of the age of twenty-one years who have been inhabitants in any one county within the state twelve months immediately preceding the day of any election, and shall have paid public taxes;" in South Carolina "every free white man of the age of twenty-one years, being a citizen of the state and having resided therein two years previous to the day of election, and who hath a freehold of fifty acres of land, or a town lot of which he hath been legally seized and possessed at least six

months before such election, or (not having such freehold or town lot) hath been a resident within the election district in which he offers to give his vote six months before said election, and hath paid a tax the preceding year of three shillings sterling towards the support of the government;" and in Georgia such "citizens and inhabitants of the state as shall have attained to the age of twenty-one years, and shall have paid tax for the year next preceding the election, and shall have resided six months within the county."

§ 812. *The constitution does not recognize female suffrage.*

In this condition of the law in respect to suffrage in the several states it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.

But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the constitution. By article 4, section 2, it is provided that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." If suffrage is necessarily a part of citizenship, then the citizens of each state must be entitled to vote in the several states precisely as their citizens are. This is more than asserting that they may change their residence and become citizens of the state and thus be voters. It goes to the extent of insisting that while retaining their original citizenship they may vote in any state. This, we think, has never been claimed. And again, by the very terms of the amendment we have been considering (the fourteenth), "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in the rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state." Why this, if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, "persons." They are counted in the enumeration upon which the apportionment is to be made, but if they were necessarily voters because of their citizenship, unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been selected to express the idea here indicated if suffrage was the absolute right of all citizens.

And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude." The fourteenth amendment had already provided that no state should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the constitution to prevent its being denied on account of race,

etc.? Nothing is more evident than that the greater must include the less, and if all were already protected, why go through with the form of amending the constitution to protect a part?

§ 813. *The duty of the United States to guaranty to each state a republican form of government does not require it to secure women the right of suffrage.*

It is true that the United States guaranties to every state a republican form of government. Constitution, article 4, § 4. It is also true that no state can pass a bill of attainder (id., article 1, § 10), and that no person can be deprived of life, liberty or property without due process of law. Id., amendment 5. All these several provisions of the constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances. The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guarantied in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended. The guaranty necessary implies a duty on the part of the states themselves to provide such a government. All the states had governments when the constitution was adopted. In all the people participated, to some extent, through their representatives elected in the manner specially provided. These governments the constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the states to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the constitution. As has been seen, all the citizens of the states were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the constitution, because women are not made voters.

§ 814. *The exclusion of women from suffrage is not a deprivation of life, liberty or property without due process of law.*

The same may be said of the other provisions just quoted. Women were excluded from suffrage in nearly all the states by the express provision of their constitutions and laws. If that had been equivalent to a bill of attainder, certainly its abrogation would not have been left to implication. Nothing less than express language would have been employed to effect so radical a change. So also of the amendment which declares that no person shall be deprived of life, liberty or property without due process of law, adopted as it was as early as 1791. If suffrage was intended to be included within its obligations, language better adapted to express that intent would most certainly have been employed. The right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law, but in order to claim protection he must first show that he has the right.

But we have already sufficiently considered the proof found upon the inside of the constitution. That upon the outside is equally effective. The constitution was submitted to the states for adoption in 1787, and was ratified by nine states in 1788, and finally by the thirteen original states in 1790. Vermont was the first new state admitted to the Union, and it came in under a constitution which conferred the right of suffrage only upon men of the full age of twenty-one years, having resided in the state for the space of one whole year next before the election, and who were of quiet and peaceable behavior. This

was in 1791. The next year, 1792, Kentucky followed with a constitution confining the right of suffrage to free male citizens of the age of twenty-one years who had resided in the state two years, or in the county in which they offered to vote one year, next before the election. Then followed Tennessee, in 1796, with voters of freemen of the age of twenty-one years and upwards, possessing a freehold in the county wherein they may vote, and being inhabitants of the state, or freemen, being inhabitants of any one county in the state, six months immediately preceding the day of election. But we need not particularize further. No new state has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission. On the contrary, as is claimed in the argument, the right of suffrage was withdrawn from women as early as 1807 in the state of New Jersey, without any attempt to obtain the interference of the United States to prevent it. Since then the governments of the insurgent states have been reorganized under a requirement that before their representatives could be admitted to seats in congress they must have adopted new constitutions, republican in form. In no one of these constitutions was suffrage conferred upon women, and yet the states have all been restored to their original position as states in the Union.

Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may, under certain circumstances, vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota and Texas. Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice, long continued, can settle the construction of so important an instrument as the constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a state to withhold.

§ 815. *The constitution does not confer the right of suffrage on any one.*

Being unanimously of the opinion that the constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several states which commit that important trust to men alone are not necessarily void, we affirm the judgment.

## BRADWELL v. THE STATE.

(16 Wallace, 130-142. 1872.)

ERROR to the Supreme Court of Illinois.

STATEMENT OF FACTS.—Mrs. Myra Bradwell made application to the supreme court of the state of Illinois for a license to practice law in the courts of the state. Her application was refused, and she brought the case to this court.

Opinion by MR. JUSTICE MILLER.

The record in this case is not very perfect, but it may be fairly taken that the plaintiff asserted her right to a license on the grounds, among others, that she was a citizen of the United States, and that having been a citizen of Vermont at one time, she was, in the state of Illinois, entitled to any right granted to citizens of the latter state. The court having overruled these claims of right founded on the clauses of the federal constitution before referred to, those propositions may be considered as properly before this court.

§ 816. *Protection designed by the provision guarantying equal privileges and immunities.*

As regards the provision of the constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, the plaintiff in her affidavit has stated very clearly a case to which it is inapplicable. The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the state whose laws are complained of. If the plaintiff was a citizen of the state of Illinois, that provision of the constitution gave her no protection against its courts or its legislation.

§ 817. *Citizens of the United States are citizens of the state within which they reside.*

The plaintiff seems to have seen this difficulty, and attempts to avoid it by stating that she was born in Vermont. While she remained in Vermont that circumstance made her a citizen of that state. But she states, at the same time, that she is a citizen of the United States, and that she is now, and has been for many years past, a resident of Chicago, in the state of Illinois. The fourteenth amendment declares that citizens of the United States are citizens of the state within which they reside; therefore the plaintiff was, at the time of making her application, a citizen of the United States and a citizen of the state of Illinois. We do not here mean to say that there may not be a temporary residence in one state, with intent to return to another, which will not create citizenship in the former. But the plaintiff states nothing to take her case out of the definition of citizenship of a state as defined by the first section of the fourteenth amendment.

§ 818. *The fourteenth amendment does not confer on women the right to practice law.*

In regard to that amendment counsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a state from abridging them, and he proceeds to argue that admission to the bar of a state of a person who possesses the requisite learning and character is one of those which a state may not deny. In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these, and these alone, which a state is forbidden to abridge. But the right to admission to practice in the courts of

a state is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any state, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the state and federal courts, who were not citizens of the United States or of any state. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a state, it would relate to citizenship of the state, and as to federal courts, it would relate to citizenship of the United States.

The opinion just delivered in the Slaughter-House Cases (16 Wall., 36; §§ 752-801, *supra*) renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license. It is unnecessary to repeat the argument on which the judgment in those cases is founded. It is sufficient to say they are conclusive of the present case. *Judgment affirmed.*

MR. JUSTICE BRADLEY concurred in the judgment, but not for the reasons stated. His views were expressed in the following language: "The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the state; and, in my opinion, in view of the peculiar characteristics, destiny and mission of woman, it is within the province of the legislature to ordain what offices, positions and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex."

JUSTICES SWAYNE and FIELD concurred in the views of JUSTICE BRADLEY. The CHIEF JUSTICE dissented from the judgment.

#### CONNER v. ELLIOTT.

(18 Howard, 591-594. 1855.)

ERROR to the Supreme Court of Louisiana.

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—In the course of proceedings which were had in Louisiana, under the laws and in the courts of that state, to determine the rights of parties interested in the succession of Henry L. Conner, deceased, a citizen of the state of Mississippi, his widow, who is the plaintiff in error in this case, filed in the district court of the tenth judicial district of the state of Louisiana, a

petition, claiming to be entitled to her rights of marital community, as they exist under the laws of that state. These rights having been denied by the district court, an appeal was prosecuted to the supreme court; and it was there held that inasmuch as the marriage through which the appellant claimed was not in fact contracted in Louisiana, nor in contemplation of a matrimonial domicile in that state, and the spouses had never resided therein, the wife was not a partner in community with the husband by force of the laws of Louisiana.

On this writ of error, it neither is nor can be denied that the supreme court of Louisiana has correctly declared and applied the law of that state to this case. But it is insisted that this law deprives the plaintiff in error, a citizen of the state of Mississippi, of one of the privileges of a citizen in the state of Louisiana, and therefore is in contravention of the first clause of the second section of the fourth article of the constitution, which provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." It appears upon the record that this question was raised by the pleadings, and presented to and decided by the highest court of the state; it is therefore open here, upon this writ of error, for final determination by this court under the twenty-fifth section of the judiciary act of 1789. 1 Stats. at Large, 85.

It appears that the plaintiff in error, though a native-born citizen of Louisiana, was married in the state of Mississippi, while under age, with the consent of her guardian, to a citizen of the latter state, and that their domicile during the duration of their marriage was in Mississippi. But while it continued, the husband acquired a plantation and other real property in Louisiana. If the marriage had been contracted in Louisiana, the code of that state then in force (Code of 1808, art. 3, § 4) would have superinduced the rights of community. And at the time when the property in question was purchased by the husband in 1841, the code of 1825, then in force, contained the following articles: "Art. 2369. Every marriage contracted in this state superinduces, of right, partnership or community of acquets or gains if there be no stipulation to the contrary." "Art. 2370. A marriage contracted in this state, between persons who afterwards come here to live, is also subjected to the community of acquets with respect to such property as is acquired after their arrival."

§ 819. *Laws of Louisiana confining rights of marital community to persons married within the state are constitutional.*

And it is insisted that as these articles gave to what is termed in the argument a Louisiana widow the right of marital community, the laws of the state could not constitutionally deny, as it is admitted they did in fact deny, the same rights to all widows, citizens of the United States, though not married in Louisiana, or residing there during the marriage, and while the property in question was acquired. In other words, that as the laws of Louisiana provide that a contract of marriage made in that state, or the residence of persons there in the relation created by marriage, shall give rise to certain rights on the part of each in property acquired within that state by force of the article of the constitution above recited, all citizens of the United States, wherever married and residing, obtain the same rights in property acquired in that state during the marriage.

§ 820. *The "privileges" secured by the constitution are those which belong to citizenship.*

We do not deem it needful to attempt to define the meaning of the word privileges in this clause of the constitution. It is safer, and more in accordance

with the duty of a judicial tribunal, to leave its meaning to be determined in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct, and a failure to make it so would certainly produce mischief. It is sufficient for this case to say that according to the express words and clear meaning of this clause, no privileges are secured by it except those which belong to citizenship. Rights attached by the law to contracts by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed "privileges of a citizen," within the meaning of the constitution. Of that character are the rights now in question. They are incidents, ingrafted by the law of the state on the contract of marriage. And in obedience to that principle of universal jurisprudence, which requires a contract to be governed by the law of the place where it is made and to be performed, the law of Louisiana undertakes to control these incidents of a contract of marriage made within the state by persons domiciled there; but leaves such contracts, made elsewhere, to be governed by the laws of the places where they may be entered into. In this there is no departure from any sound principle, and there can be no just cause of complaint.

The law of the state further provides, that if married persons come to Louisiana to reside, and acquire property there during such residence, they shall be deemed nuptial partners in respect to such property; but if the domicile of the marriage continues out of Louisiana, the relative rights of the married persons may be regulated by the laws of the place of such domicile, even in respect to property acquired by one of them in Louisiana. That the first of these rules, which extends the laws of the state to married persons coming to reside and acquiring property therein, is a proper exercise of legislative power, has not been questioned. But it is insisted that the last, which leaves the rights of non-resident married persons in respect to property in Louisiana to be governed by the laws of their domicile, deprives the wife of her rights as a citizen in property acquired by the husband during marriage in Louisiana. The answer to this has been already indicated. The laws of Louisiana affix certain incidents to a contract of marriage there made, or there partly or wholly executed, not because those who enter into such contracts are citizens of the state, but because they there make or perform the contract. And they refuse to affix these incidents to such contracts, made and executed elsewhere, not because the married persons are not citizens of Louisiana, but because their contract being made and performed under the laws of some other state or country, it is deemed proper not to interfere, by Louisiana laws, with the relations of married persons out of that state. Whether persons contracting marriage in Louisiana are citizens of that or some other state, or aliens, the law equally applies to their contract; and so, whether persons married and domiciled elsewhere be or be not citizens or aliens, the law fails to regulate their rights. The law does not discriminate between citizens of the state and other persons; it discriminates between contracts only. Such discrimination has no connection with the clause in the constitution now in question. If a law of Louisiana were to give to the partners *inter sese* certain peculiar rights, provided they should reside within the state, and carry on the partnership trade there, we think it could not be maintained that all copartners, citizens of the United States, residing and doing business elsewhere, must have those peculiar rights



by force of the constitution of the United States, any more than it could be maintained that because a law of Louisiana gives certain damages on protested bills of exchange, drawn or indorsed within that state, the same damages must be recoverable on bills drawn elsewhere in favor of citizens of the United States.

The rights asserted in this case, before the supreme court of Louisiana, are not privileges of citizenship; consequently, there is no error in the judgment of that court, which is hereby affirmed.

MCCREADY v. VIRGINIA.

(4 Otto, 391-397. 1876.)

ERROR to the Supreme Court of Appeals of Virginia.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The precise question to be determined in this case is, whether the state of Virginia can prohibit the citizens of other states from planting oysters in Ware river, a stream in that state where the tide ebbs and flows, when its own citizens have that privilege.

§ 821. *The states own the tide-waters within their jurisdiction and the fish in them.*

The principle has long been settled in this court, that each state owns the beds of all the tide-waters within its jurisdiction, unless they have been granted away. *Pollard v. Hagan*, 3 How., 212; *Smith v. State of Maryland*, 18 How., 74; *Mumford v. Wardwell*, 6 Wall., 436; *Weber v. Harbor Commissioners*, 18 id., 66. In like manner, the states own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty. *Martin v. Waddell*, 16 Pet., 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the state, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.

§ 822. *Article 4, section 2, of the federal constitution does not invest the citizens of one state with any interest in the common property of the citizens of another state.*

By article 4, section 2, of the constitution, the citizens of each state are "entitled to all privileges and immunities of citizens in the several states." Mr. Justice Washington, in *Corfield v. Coryell*, 4 Wash., 380, thought that this provision extended only to such privileges and immunities as are "in their nature fundamental; which belong of right to the citizens of all free governments." And Mr. Justice Curtis, in *Scott v. Sandford*, 19 How., 580, described them as such "as belonged to general citizenship." But usually, when this provision of the constitution has been under consideration, the courts have

manifested the disposition, which this court did in *Conner v. Elliott*, 18 How., 593 (§§ 819, 820, *supra*), not to attempt to define the words, but "rather to leave their meaning to be determined in each case upon a view of the particular rights asserted or denied therein." This clearly is the safer course to pursue, when, to use the language of Mr. Justice Curtis, in *Conner v. Elliott*, "we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct, and a failure to make it so would certainly produce mischief." Following, then, this salutary rule, and looking only to the particular right which is here asserted, we think we may safely hold that the citizens of one state are not invested by this clause of the constitution with any interest in the common property of the citizens of another state. If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other states had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the state had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other states avail themselves of such a privilege. And the reason is obvious: the right thus granted is not a privilege or immunity of general but of special citizenship. It does not "belong of right to the citizens of all free governments," but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality.

§ 823. *A state has the right to prohibit persons who are not citizens thereof from planting oysters in its tide-waters.*

The planting of oysters in the soil covered by water owned in common by the people of the state is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the state, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a state may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might, by appropriate legislation, confine the use of the whole to its own people alone.

§ 824. — *such a law is not a regulation of commerce.*

Neither do we think this case is at all affected by the clause of the constitution which confers power on congress to regulate commerce. Art. 1, sec. 8. There is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade. Virginia, owning land under water adapted to the propagation and improvement of oysters, has seen fit to grant the exclusive use of it for that purpose to the citizens of the state. In this way the people of Virginia may be enabled to produce what the people of the other states cannot; but that is because they own property which the others do not. Their productions do not spring from commerce, but commerce to some extent from them.

We are unable to agree with the counsel for the plaintiff in error in his

argument that the right of planting may be enforced as a privilege of interstate citizenship, even though that of taking cannot. Planting means, in "oysterman's phraseology," as counsel say, "depositing with the intent that the oysters shall remain until they are fattened." The object is, therefore, to make use of the soil and the water above it for the improvement and growth of that which is planted. It is this use, as has already been seen, that the state has the right, by reason of its ownership, to prohibit.

*Judgment affirmed.*

WARD v. MARYLAND.

(12 Wallace, 418-433. 1870.)

ERROR to the Supreme Court of Appeals of Maryland.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Power to re-examine final judgments of the state courts rendered in criminal prosecutions, as well as those rendered in civil suits, is conferred upon the supreme court when it appears that the judgment was rendered in the highest court of law in which a decision in the case could be had, and that there was drawn in question the validity of a statute of a state, on the ground of its being repugnant to the constitution of the United States, and that the decision of the state court was in favor of the validity of the statute. 1 Stat. at Large, 85.

Persons not permanent residents in the state are prohibited by the laws of Maryland from selling, offering for sale, or exposing for sale, within a certain district of the state, any goods whatever, other than agricultural products and articles manufactured in the state, either by card, sample, or other specimen, or by written or printed trade-list or catalogue, whether such person be the maker or manufacturer or not, without first obtaining a license so to do. Licenses may be granted by the proper authorities of the state for that purpose, on the payment of \$300, "to run one year from date." Both residents and non-residents of that district are also forbidden to suffer or permit any person, not a permanent resident of the state, and not in their regular employment or service, to sell any goods in that way under their name or the name of their firm, or at their store, warehouse, or place of business. Offenders against either of those prohibitions are made liable to indictment, and, upon conviction, may be fined not less than four hundred nor more than six hundred dollars for each offense. Session Acts, 1868, p. 786.

Ward, the defendant, is a citizen of New Jersey, and not a permanent resident of Maryland, and the record shows that he, on the day therein named, at a place within the prohibited district, sold to the persons therein named, "by specimen, to wit, by sample," certain goods other than agricultural products or articles manufactured in the state, without first obtaining a license so to do, and that he was indicted for those acts in the proper criminal court, and was arraigned therein and pleaded not guilty to the indictment. Apart from the plea of not guilty is the further statement in the record, that the defendant "puts himself upon the judgment of the court here, according to the act of assembly in such cases made and provided," and that the attorney for the state doth the like. All matters of fact having been agreed, the parties submitted the case to the court, to the end that the judgment of the court might be obtained, whether the statute of the state was or was not constitutional and valid. Judgment was rendered for the state, and the criminal court sentenced the

defendant to pay a fine of \$400 and costs, and the court below, upon appeal, affirmed the judgment. Adjudged constitutional, as the state law was by that decision, the defendant, as he had a right to do, sued out a writ of error, and removed the record into this court for re-examination.

Congress possesses the power to regulate commerce among the several states as well as commerce with foreign nations, and the constitution also provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and the defendant contends that the statute of the state under consideration, in its practical operation, is repugnant to both of those provisions of the constitution, as it either works a complete prohibition of all commerce from the other states in goods to be sold by sample within the limits of the described district, or at least creates an unjust and onerous discrimination in favor of the citizens of the state enacting the statute, in respect to an extensive and otherwise lucrative branch of interstate commerce, by securing to the citizens of that state, if not the exclusive control of the market, very important special privileges and immunities by exemption from burdensome requirements and onerous exactions imposed upon the citizens of the other states desirous of engaging in the same mercantile pursuits in that district. Attempt is made, in argument, to show, in behalf of the state, that the statute in question does not make any such discrimination against the citizens of the other states as is supposed by the defendant; that the citizens of the state are in fact subjected to substantially the same requirements and exactions as are imposed upon the citizens of other states; but it is too clear for argument, in a judicial opinion, that the articles of the code referred to as establishing that theory do not support the proposition, nor do they give it any countenance whatever. Those enactments forbid resident traders, other than the grower, maker or manufacturer, to barter or sell any goods or chattels without first obtaining a license in the manner therein prescribed, and they also point out the steps to be taken by the applicant to obtain it, and what he must state in his application for that purpose.

Small traders, whose stock generally kept on hand at the principal season of sale does not exceed \$1,000, and are not engaged in selling spirituous or fermented liquors, are required to pay for the license the sum of \$12. If more than \$1,000, and not more than \$1,500, they are required to pay the sum of \$15, and so on through ten other gradations, the last of which requires the applicant to pay the sum of \$150, where his stock generally kept on hand at the principal season of sale exceeds \$40,000, which is the largest exaction made of any resident trader, not engaged in the sale of spirituous or fermented liquors. Compare one set of the regulations with the other, and comment is unnecessary, as the comparison shows to a demonstration that the statute in question does discriminate in favor of the citizens of the state, and that the opposite theory finds no support from the articles of the code which forbid resident traders from bartering or selling goods or chattels without first obtaining a license for that purpose, as therein prescribed.

§ 825. *A license law of a state, discriminating against citizens of other states, is unconstitutional.*

State power to lay and collect taxes may reach every subject over which the unrestricted power of the state extends, but the states cannot, without the consent of congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws; nor can they, without the consent of congress, lay any duty of tonnage, as they are expressly pro-

hibited from so doing by the constitution. Implied prohibitions restricting the power of the states to lay and collect taxes also exist, which are as effectual to that end as those which are express. Undoubtedly the states may tax every subject of value, within the sovereignty of the state, belonging to the citizens as mere private property, but the power of taxation does not extend to the instruments of the federal government, nor to the constitutional means employed by congress to carry into execution the powers conferred in the federal constitution. *McCulloch v. State of Maryland*, 4 Wheat., 424 (§§ 380-398, *supra*).

§ 826. *The taxing power of the states.*

Power to tax for state purposes is as much an exclusive power in the states as the power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States is an exclusive power in congress. Both are subject, however, to certain prohibitions and restrictions, but in all other respects they are supreme powers possessed by each government entirely independent of the other. Congress may lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare, but direct taxation must be apportioned among the several states according to their respective numbers, and all duties, imposts and excises must be uniform. Articles exported from any state cannot be subjected to any tax or duty, nor is it competent for congress to tax the salaries of the judges of the state courts, as the exercise of such a power is repugnant to the admitted right of the states to create courts, appoint judges, and provide for their compensation. Subject to those prohibitions and restrictions, and others of a like character, the power of congress to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare, is without limitation; but the powers granted to congress are not in every case exclusive of similar powers existing in the states, unless where the constitution has so provided, or where the nature of the power granted, or the terms in which the grant is made, are of character to show that state legislation upon the subject would be repugnant to the federal grant, or that the framers of the constitution intended that the power should be exclusively exercised by congress.

Outside of the prohibitions, express and implied, contained in the federal constitution, the power of the states to tax for the support of their own governments is co-extensive with the subjects within their unrestricted sovereign power, which shows conclusively that the power to tax may be exercised at the same time and upon the same subjects of private property by the United States and by the states without inconsistency or repugnancy. Such a power exists in the United States by virtue of an express grant for the purpose; among other things of paying the debts and providing for the common defense and general welfare; and it exists in the states for the support of their own governments, because they possessed the power without restriction before the federal constitution was adopted, and still retain it, except so far as the right is prohibited or restricted by that instrument. *Gibbons v. Ogden*, 9 Wheat., 199 (§§ 1183-1201, *infra*); *Nathan v. Louisiana*, 8 How., 82 (§§ 1035-37, *infra*).

Possessing, as the states do, the power to tax for the support of their own governments, it follows that they may enact reasonable regulations to provide for the collection of the taxes levied for that purpose, not inconsistent with the power of congress to regulate commerce, nor repugnant to the laws passed by congress upon the same subject. Reasonable regulations for the collection of such taxes may be passed by the states, whether the property taxed belongs to

residents or non-residents; and, in the absence of any congressional legislation upon the same subject, no doubt is entertained that such regulations, if not in any way discriminating against the citizens of other states, may be upheld as valid; but very grave doubts are entertained whether the statute in question does not embrace elements of regulation not warranted by the constitution, even if it be admitted that the subject is left wholly untouched by any act of congress.

§ 827. *Limitations upon the taxing power of the states.*

Excise taxes levied by a state upon commodities not produced to any considerable extent by the citizens of the state may, perhaps, be so excessive and unjust in respect to the citizens of the other states as to violate that provision of the constitution, even though congress has not legislated upon that precise subject; but it is not necessary to decide any of those questions in the case before the court, as the court is unhesitatingly of the opinion that the statute in question is repugnant to the second section of the fourth article of the constitution, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. *Woodruff v. Parham*, 8 Wall., 139 (§§ 1471-73, *infra*); *Hinson v. Lott*, 8 id., 151. Taxes, it is conceded in those cases, may be imposed by a state on all sales made within the state, whether the goods sold were the produce of the state imposing the tax, or of some other state, provided the tax imposed is uniform; but the court at the same time decides in both cases that a tax discriminating against the commodities of the citizens of the other states of the Union would be inconsistent with the provisions of the federal constitution, and that the law imposing such a tax would be unconstitutional and invalid. Such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license, which must be paid by the consumer or by the seller himself; and in either event the amount charged is equivalent to a direct tax upon the goods or commodities. *Brown v. State of Maryland*, 12 Wheat., 444 (§§ 1466-70, *infra*); *People v. Maring*, 3 Keyes, 374.

Imposed as the exaction is upon persons not permanent residents in the state, it is not possible to deny that the tax is discriminating with any hope that the proposition could be sustained by the court. Few cases have arisen in which this court has found it necessary to apply the guaranty ordained in the clause of the constitution under consideration. *Conner v. Elliott*, 18 How., 593 (§§ 819, 820, *supra*).

§ 828. *It is one of the privileges of a citizen of one state to sell goods in another state subject to no higher tax than that exacted by law of residents of the latter state. (a)*

Attempt will not be made to define the words "privileges and immunities," or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond

(a) In *Ex parte Thornton*,\* 4 Hughes, 220, a license law of Virginia was considered, which imposed a higher tax upon sample merchants than upon others whom it designated simply as merchants. Counsel contended that the intent was to discriminate against non-residents, and the court held that if such was in fact the intent, then the law was unconstitutional. But it was also held, that before the court could declare the law void, the intent must be proved, and that the practical effect of the law was a discrimination against non-residents. The court announced the principle on which the validity of the act depended on the authority of *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*); *Woodruff v. Parham*, 8 Wall., 123 (§§ 1471-73, *infra*); *Cook v. Pennsylvania*, 97 U. S., 568 (§§ 1478-80, *infra*); *Webber v. Virginia*, 103 U. S., 330 (§§ 1387-90, *infra*); *Welton v. Missouri*, 91 U. S., 275 (§§ 1379-83, *infra*); *Ward v. Maryland*, 12 Wall., 418 (§§ 823-323, *supra*), and held that as there was no proof that merchants, as such, were residents, and sample merchants were non-residents, the objection to the law was not tenable.

doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. *Cooley on Const. Lim.*, 16; *Brown v. State of Maryland*, 12 Wheat., 449 (§§ 1466-70, *infra*).

Comprehensive as the power of the states is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the constitution; and inasmuch as the constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the state might sell, or offer or expose for sale, in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents. *State v. North*, 27 Mo., 467; *Fire Department v. Wright*, 3 E. D. Smith, 478; *Paul v. Virginia*, 8 Wall., 177 (§§ 1052-59, *infra*). Grant that the states may impose discriminating taxes against the citizens of other states, and it will soon be found that the power conferred upon congress to regulate interstate commerce is of no value, as the unrestricted power of the state to tax will prove to be more efficacious to promote inequality than any regulations which congress can pass to preserve the equality of right contemplated by the constitution among the citizens of the several states. Excise taxes, it is everywhere conceded, may be imposed by the states, if not in any sense discriminating; but it should not be forgotten that the people of the several states live under one common constitution, which was ordained to establish justice, and which, with the laws of congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in state taxation when the power is applied to the citizens of the other states. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the confederation; and the new constitution was adopted, among other things, to remedy those defects in the prior system.

Evidence to show that the framers of the constitution intended to remove those great evils in the government is found in every one of the sections of the constitution already referred to, and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, showing that congress, as well as the states, is forbidden to make any discrimination in enacting commercial or revenue regulations. Strong support to the same view is also derived from the succeeding clause in the same section of the constitution, which provides that vessels bound to or from a state shall not be obliged to enter, clear or pay duties in another. Important as these provisions have been supposed to be, still it is clear that they would become comparatively valueless if it should be held that each state possesses the power, in levying taxes for the support of its own government, to discriminate against the citizens of every other state of the Union.

Much consideration was given to those clauses of the constitution in the

Passenger Cases, 7 How., 400 (§§ 1284-1335, *infra*), and they were there regarded as limitations upon the power of congress to regulate commerce, and as intended to secure entire commercial equality, and also as prohibitions upon the states to destroy such equality by any legislation prescribing any conditions upon which vessels bound from one state to another shall be permitted to enter the ports of another state. Congress, said Mr. Justice Grier, has regulated commerce by willing that it shall be free, and it is therefore not left to the discretion of each state either to refuse a right of passage through her territory or to exact a duty for permission to exercise such a privilege.

Viewed in any light, the court is of the opinion that the statute in question imposes a discriminating tax upon all persons trading in the manner described in the district mentioned in the indictment, who are not permanent residents in the state, and that the statute is repugnant to the federal constitution, and invalid for that reason.

MR. JUSTICE BRADLEY concurred in the opinion; and held further, that the act was in violation of the commercial clause of the constitution, and would be invalid even if there was no discrimination.

§ 829. Section 2, article 4, construed.—The constitution guaranties to the citizens of each state only the fundamental rights of citizens in other states; and the legislature of a state is not bound to extend to citizens of other states the same advantages as are secured to its own citizens. *Corfield v. Coryell*,\* 4 Wash., 371; *Paul v. Virginia*, 8 Wall., 169 (§§ 1032-59); *Woodruff v. Parham*, 8 Wall., 123 (§§ 1471-73).

§ 830. Article 4, section 2, declaring that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states," was intended merely to inhibit discriminative legislation by the states. *United States v. Harris*, 16 Otto, 629 (§§ 912-919).

§ 831. It seems that the second section of article 4 of the constitution, which grants to the citizens of each state all the privileges and immunities of citizens of the several states, applies only to citizens going from one state to another. *United States v. Rhodes*, 1 Abb., 46. It refers to the privileges of citizens in the states to which they go, not in those from which they come. *Ex parte Kinney*, 8 Hughes, 9 (§§ 883-893).

§ 832. Remedial legislation by congress.—There can be no constitutional legislation of congress for directly enforcing the "privileges and immunities of citizens of the United States," by original proceedings in the courts of the United States, where the only constitutional guaranty of such privileges and immunities is, that no state shall pass any law to abridge them, and where the state has passed no laws adverse to them, but, on the contrary, has passed laws to sustain and enforce them. *United States v. Cruikshank*,\* 1 Woods, 308. See §§ 898-911.

§ 833. Congress has power to enforce, by appropriate legislation, every right given or guaranteed by the constitution. But with regard to those acknowledged rights and privileges of the citizen, inherited from the mother country, it is the duty of the state to protect and enforce them, and to do nothing to deprive him of their full enjoyment. When any of these rights and privileges are secured in the constitution of the United States only by a declaration that the state or the United States shall not violate or abridge them, they are not created but guaranteed. Their affirmative enforcement, unless something more is expressed, does not belong to the United States but to the states. *Ibid.*

§ 834. Sections 641 and 642 of the Revised Statutes of the United States, providing for a removal to the federal courts of criminal prosecutions commenced in the state courts against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit is prosecuted, any right secured to him by any law providing for the equal rights of all citizens or of all persons within the jurisdiction of the United States, are authorized by the power conferred on congress by the fourteenth amendment. Under these sections, colored persons accused of offenses against the state may have their cases removed into the federal courts, if they are denied the right to a jury composed partly of citizens of their own race and color. *Ex parte Reynolds*,\* 8 Hughes, 559. (But see *Virginia v. Rives*, §§ 929-940, *infra*, where the *mandamus* applied for in this case was granted.)

§ 835. The supplemental Civil Rights Act of March 1, 1875, so far as it seeks to inflict penalties for the violation of any or all rights which belong to citizens of a state, and not the citi-



zens of the United States, as such, was the exercise of a power not authorized by the constitution of the United States. The privilege of using a public conveyance for local travel is not a right arising under the constitution of the United States, and for a denial of this privilege no recovery can be had under the act, unless it is on account of race, color or previous condition of servitude. *Cully v. Baltimore & Ohio R. Co.*, \* 1 Hughes, 536.

§ 836. Under the fourteenth amendment to the constitution, congress, by appropriate legislation, can protect the citizen of a state in the exercise of all the rights conferred upon him as such, and which distinguish him from those who are aliens or merely residents in the state. Under this amendment the United States is not clothed with authority to enforce the rights common to all men, but those only which are peculiar to citizenship. (Per BOND, J.) *United States v. Petersburg Judges of Election*, 1 Hughes, 493.

§ 837. Corporations.—The provision in the constitution of the United States, "that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," cannot be applied to corporations. *Warren Manuf'g Co. v. Etna Ins. Co.*, 2 Paine, 516; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall., 566; *Paul v. Virginia*, 8 Wall., 169 (§§ 1052-59). See § 733.

§ 838. The power of the state to discriminate between her own domestic corporations and those of other states, desirous of transacting business within her jurisdiction, is clearly established. As to the nature or degree of discrimination, it belongs to the state to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union. *Ducat v. Chicago*, \* 10 Wall., 410. See CORPORATIONS, IX.

§ 839. Corporations are not citizens within the meaning of the constitutional provision that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. And the acts of the state of Illinois requiring the agent of any foreign insurance company desiring to transact business in the state to take out a license, and before obtaining it to furnish a statement under the oath of the president or secretary showing its name and locality, the amount of its capital stock, the portion paid in, the assets of the company, and to furnish an instrument under the seal of the company authorizing the agent to accept service of process, and agreeing that service on him shall be valid; charging \$5 for filing and examining the statement and \$1 for the certificate; and also requiring foreign companies doing business in Chicago to pay to the treasurer the sum of two dollars upon the hundred, and at that rate upon the amount of all premiums which shall have been received, and providing in case of default for the recovery of such sums, is not in conflict with the above constitutional provision or the commercial power of congress. *Ibid.*

§ 840. It is held that a corporation is included in the word person, as used in the act of congress of April 20, 1871, which declares that "any person who, under color of any law, etc., of any state, shall subject, or cause to be subjected, any person within the jurisdiction of the United States, to the deprivation of any rights, privileges or immunities secured by the constitution of the United States, shall, any such law, etc., to the contrary notwithstanding, be liable to the party injured, in any action at law, suit in equity, or other proper proceeding for redress." And this, although this act was passed under the provisions of the fourteenth amendment. The fact that persons hold their rights or property under the name of a corporation cannot deprive them of the rights and remedies which the constitution and this act seek to confer. If the chartered rights of a corporation are about to be violated by a state law or ordinance which will impair the contract of the charter, the federal courts have jurisdiction of a bill under this act. *Northwestern Fertilizing Co. v. Town of Hyde Park*, 3 Biss., 480.

§ 841. Monopolies.—In 1869 the legislature of Louisiana granted to a corporation an exclusive franchise to slaughter animals within the limits of New Orleans for twenty-five years. The constitution of that state, of 1879, attempted to abolish the monopoly features, or the exclusiveness, of all corporations except those contained in the charters of railroads. The same constitution withdrew from the legislature the power to regulate the slaughtering of animals in cities and parishes, and conferred it upon the municipal and parochial authorities, in conjunction with the local boards of health. It was held that this new constitution could not, under article 1, § 10, of the constitution of the United States, destroy the exclusiveness of the franchise granted to the corporation, that organ of the government vested with the police power of the state with reference to the subject having sanctioned the place and manner of conducting the business of the corporation as harmless. *Crescent City, etc., Co. v. Butchers' Union, etc., Co.*, \* 9 Fed. R., 743. See §§ 733, 739.

§ 842. Right to take oysters in the waters of a state.—The act of the legislature of New Jersey of June 9, 1820, excluding the citizens of other states from participation in the right of taking oysters within the waters of the state, does not infringe that section of the constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. *Corfield v. Coryell*, \* 4 Wash., 871. See §§ 749, 1091.

§ 843. **Right of security in one's house.**—The right of security in one's house is not a right derived from the constitution, but existed at common law long before the adoption of the constitution, and cannot be said to come within the meaning of the words "right, privilege or immunity granted or secured by the constitution of the United States," as used in the act of congress of March 31, 1870. *United States v. Crosby*, 1 Hughes, 448.

§ 844. **Use of highways.**—The citizens of one state have, under the constitution of the United States, the same right to use the public highways by land and water of another state as the citizens of the latter have. *Mason v. The Boom Co.*, \* 3 Wall. Jr., 252.

§ 845. **Suits in federal courts.**—The legislature of a state cannot take away the privilege conferred by the constitutional laws of the Union upon citizens of other states, to sue in the courts of the United States, by enacting a special remedy in its own courts. *Ibid.*

§ 846. **Civil Rights Act included white persons.**—The criminal jurisdiction conferred by the third section of the Civil Rights Bill of April 9, 1866, is not limited to colored persons, but includes white persons in its operations. This construction is in harmony with the title of the bill, and carries into effect the obvious intention of congress in passing it. *United States v. Rhodes*, 1 Abb., 35.

§ 847. **Trial by jury.**—The right of trial by jury in state courts is not a privilege of national citizenship. *Walker v. Sauvinet*, 2 Otto, 90 (§§ 690-692). See XI, 8.

§ 848. **Taxing non-residents.**—A law of the state of New York, which provides that non-residents engaged in business within the state shall be taxed on the capital thus invested by them the same as if they were residents, is constitutional. There is no higher law of the United States which gives a non-resident a right to demand that the property of a resident citizen should pay for the protection afforded by the laws to the property of a non-resident. The equal "immunities and privileges" "secured to the citizens of each state" in the "several states" does not demand such a requirement as this. Nor does this law conflict with the constitutional prohibition against a state's imposing duties on property imported into it. Not having been relinquished by the several states, the taxing power may be exercised by any state upon all property within its borders. *Duer v. Small*, \* 17 How. Pr., 202; 4 Blatch., 365. See II, 3.

§ 849. **Free negroes.**—A clause in the city charter of Washington giving the city the power of fixing the terms on which free negroes coming to the city might reside therein is not in conflict with the constitution. Though the citizens of every state are entitled to the privileges and immunities of the citizens of the several states, yet every state has the right to pass laws to preserve the peace and the morals of society, and if there be a class of people more likely than others to disturb the public peace, or corrupt the public morals, and if that class can be clearly designated, it has a right to impose on that class such reasonable terms and conditions of residence as will guard the state from the evils it has reason to apprehend. A citizen of one state coming to another state can claim only those privileges and immunities which belong to the citizens of the latter state in like circumstances. *Costin v. Corporation of Washington*, 2 Cr. C. C., 257.

§ 850. **Africans, and persons of African descent, though emancipated, are not citizens of the United States in the sense of that term as used in that clause of the constitution of the United States conferring upon the citizens of one state all the privileges of a citizen in every other state, and in the courts of the United States.** (McLEAN and CURTIS, JJ., dissenting.) *Scott v. Sandford*, 1 How., 406.

§ 851. **License tax.**—The exaction by a city ordinance of a license tax for the privilege of selling by the cask, in the city, ale or beer not manufactured in the city, is not repugnant to the constitutional provision guarantying equal privileges and immunities. *Downham v. Alexandria Council*, \* 10 Wall., 173.

§ 852. **Statutes of limitation.**—The statute of limitations of the state of Wisconsin provides that if the defendant is out of the state it shall not run against the plaintiff if the latter is a resident, but shall if he is not. *Held*, that the statute is not unconstitutional as being repugnant to that clause of the constitution of the United States which provides that "citizens of each state shall be entitled to the privileges and immunities of citizens in the several states." *Chemung Canal Bank v. Lowery*, 8 Otto, 76.

§ 853. **Maryland laws.**—Neither the constitution of Maryland, nor any statute of that state or of the United States, denies a colored person, merely as such, any civil rights as a citizen. *Johnson v. Brown*, 4 Cr. C. C., 236.

§ 854. **Marriage.**—The court follows the holding of the supreme court of Georgia, that section 1707 of the code of that state, forbidding marriages between white persons and persons of African descent, is not abrogated by the provision in the constitution of the state, adopted in 1868, that "the social status of the citizen shall never be the subject of legislation." *Ex rel Hobbs*, 1 Woods, 537. See §§ 746, 857, 859.

§ 855. **The act of the legislature of Georgia, declaring that "the marriage relation between**

white persons and persons of African descent is forever prohibited, and such marriages shall be null and void," is not a violation of the fourteenth amendment, or in conflict with the Civil Rights Act of April 9, 1868. Neither is the act of the state which punishes colored and white persons who are found guilty of fornication, open to either of these objections, the punishment being the same for both. *Ibid*.

## VII. EQUAL PROTECTION OF THE LAWS.

[Consult sub-titles VI and IX.]

**SUMMARY**—*Constitutional provision, § 856.—Punishing white person for marrying a negro, § 857.—Punishing adultery, § 858.—Right of marriage, § 859.—Privileges of citizens under the fourteenth amendment, § 860.—Schools for colored children, § 861.—Conspiracy to deprive colored persons of rights; certain rights not guaranteed, §§ 862, 863, 865, 866, 867.—Section 5519, Revised Statutes, unconstitutional, §§ 864, 867.—Object of the thirteenth amendment, §§ 865, 872.—The fourteenth amendment is a restraint upon the states, § 866.—Object of the fifteenth amendment, § 867; of the fourteenth, §§ 868, 871, 872.—Confining selection of jurors to white persons, §§ 868-870, 874, 876, 877.—Removal of causes to federal courts, §§ 871, 876.—The thirteenth and fourteenth amendments enlarge the powers of congress, § 872.—Appropriate legislation under the fourteenth amendment, § 873.—Liability of state judges under act of March 1, 1875, § 874.—Refusal of a state to redress wrongs, § 875.—Fifteenth amendment abrogated conflicting state laws, § 876.—Grounds for quashing indictment, § 877.—Denial of right of colored persons to testify, § 878.—Forbidding employment of a certain class of persons, § 879.*

§ 856. "Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." Const., Fourteenth Amendment, sec. 1.

§ 857. A law punishing a white person alone for intermarriage with a negro, passed prior to the fourteenth amendment, was not abrogated by that amendment, as it is not a law discriminating against persons on account of race, color, or previous condition of servitude. That amendment was contemplated to protect the negro and secure him against discrimination. *Ex parte Francois*, §§ 880, 881. See §§ 746, 854.

§ 858. A law of a state which imposes a greater punishment upon those guilty of adultery when the culprits are of different colors or races than when of the same race, but does not discriminate in the punishment of the offenders respectively, does not infringe the fourteenth amendment. *Pace v. Alabama*, § 882.

§ 859. The right of marriage, being a right of a citizen of the state, may be abridged by the states at their pleasure; but even if it were a right of a citizen of the United States, the states are not obliged to refrain from any regulation thereof, and a law prohibiting marriage between the races denies no equal privilege to the colored race, the denial being reciprocal. *Ex parte Kinney*, §§ 883-895. See §§ 746, 854.

§ 860. The privileges of citizens under the fourteenth amendment are those which they have as citizens of the United States, and those which they have as citizens of the state wherein they reside. *Ibid*.

§ 861. The fourteenth amendment does not give the colored people the right to educate their children in the same schools as those in which the whites are educated. It merely guaranties them equal facilities and opportunities for the obtainment of education, and, if the state grants them those advantages in a separate school exclusively devoted to colored children, they have no reason to object. *Bertonneau v. Directors of City Schools*, §§ 896, 897.

§ 862. The right to assemble, except to petition congress for the redress of grievances, is not given or guarantied by the constitution or laws of the United States; nor is the right "of bearing arms for a lawful purpose;" nor the right of each citizen not to be deprived of life, liberty or property without due process of law by private individuals; and an indictment charging several defendants with conspiring to deprive certain persons of African descent of those rights, as well as of the equal protection of law and of the privilege of voting at a state election, is bad. *United States v. Cruikshank*, §§ 898-911.

§ 863. An indictment under acts of congress punishing those who deny to persons equal protection, privileges and immunities, on account of their race or color, which are guarantied them by the constitution and laws of the United States, must specifically set out the particular rights, immunities or protection of which they were sought to be deprived. A general charge following the acts is not sufficient. *Ibid*.

§ 864. Section 5519 of the Revised Statutes is unconstitutional. *United States v. Harris*, §§ 912-919.

§ 865. The thirteenth amendment was intended to abolish slavery and involuntary servitude, and contains no warrant for a law punishing individuals for conspiring to deprive another of rights accorded him by the laws. *Ibid.*

§ 866. The fourteenth amendment merely contemplated a restraint upon states in their sovereign legislative capacities, not to protect the rights of any one against private invasion, as was attempted by section 5519, Revised Statutes. *Ibid.*

§ 867. The fifteenth amendment relates entirely to the right of citizens to vote, and there is nothing therein to warrant the passage of section 5519 of Revised Statutes, which punishes all conspiracies to deprive any citizen of the equal protection of the laws and invasions of the equal privileges and immunities of all persons. *Ibid.*

§ 868. The fourteenth amendment is to be liberally construed to carry out the intentions of its framers. It was intended to secure to the colored race the civil rights of the white race; and a state law which confines the selection of jurors to persons of the white race, in criminal prosecutions against colored men, denies to the latter the equal protection of the laws, and is, therefore, unconstitutional. *Strauder v. West Virginia*, §§ 920-928.

§ 869. A criminal prosecution in which a colored man is being tried, or about to be tried, by a jury selected under a law confining the selection of jurors to the white race, and consequently in conflict with the fourteenth amendment, is a case arising under the laws of the United States, and congress having provided for the removal of such causes to the federal court, that court has jurisdiction. *Ibid.*

§ 870. A colored man is not entitled to a mixed jury. The only right to which he is entitled is that there shall be no exclusion of his race because of their color. *Virginia v. Rives*, §§ 929-940.

§ 871. The fourteenth amendment was intended for the protection of the individual against the acts of the state. Section 641 of the Revised Statutes, for the removal of causes to the federal courts, applies to cases in which the state laws deny equal protection. Hence the denial of a right to a colored person during the course of the trial, on account of race or color, can be reached only by the revisory power of the supreme court, and not by removal of the cause from the state court. *Ibid.*

§ 872. The thirteenth and fourteenth amendments were intended to take away all possibility of oppression by law because of race or color. They are limitations of the power of the states and enlargements of the power of congress. They are declaratory of rights, but they also imply immunities such as may be protected by congress. *Ex parte Virginia*, §§ 941-962.

§ 873. Whatever legislation is appropriate to carry into effect the provisions of the fourteenth amendment, if not prohibited, is within the domain of congressional power. Nor does it make any difference that such legislation is restrictive of what the state might have done before the amendment was adopted. *Ibid.*

§ 874. A state judge is liable to indictment and prosecution, under the act of March 1, 1875, for discriminating against colored persons in the selection of juries, on account of their race and color. Said act is constitutional. *Ibid.*

§ 875. The refusal of a state to redress wrongs committed by its officers in violation of the provisions of the fourteenth amendment is a denial of the rights secured by that amendment. *Neal v. Delaware*, §§ 968-974.

§ 876. The provisions of the constitution and laws of the state of Delaware, in force at the time of the adoption of the fifteenth amendment, excluded colored persons from service on juries, and were not repealed or modified so as to conform to the requirements of that amendment. *Held*, that the fifteenth amendment abrogated those provisions, so that it could not be said that the laws of Delaware discriminated against colored persons on account of race or color, and a prosecution against a colored man would not be removable to the federal courts under section 641 of the Revised Statutes, on the ground that the laws discriminated against him. *Ibid.*

§ 877. The uncontradicted affidavit of the accused, filed without objection, to the effect that colored persons were excluded from the jury on account of race and color, is a sufficient ground for quashing the indictment. *Ibid.*

§ 878. A prosecution against white persons for the murder of a colored person is not a cause affecting persons who are denied or cannot enforce in the state courts rights secured to them by the first section of the act of April 9, 1866, although colored persons who witnessed the murder are not allowed to testify by the laws of the state. Such a case is not one affecting either the colored witnesses or the person who was murdered, and is not one over which the circuit court has jurisdiction. *Blyew v. United States*, §§ 975-981. See § 1022.

§ 879. A law forbidding corporations to employ the natives of a particular country is a denial to persons of "equal protection of the laws," and void. Citizenship is not necessary to entitle one to such protection; residence only is required. *In re Parrott*, §§ 982-1007.

[NOTES.—See §§ 1008-1022.]

## EX PARTE FRANCOIS.

(Circuit Court for Texas: 3 Woods, 367-370. 1879.)

STATEMENT OF FACTS.—Francois, a white man, married a negro woman, and was indicted for having thereby violated a Texas statute, enacted in 1858. He was convicted in a state court and sentenced to imprisonment in the penitentiary. The case came before this court on an application for a writ of *habeas corpus*.

Opinion by DUVAL, D. J.

An application similar to the present one was made to me some two years ago, in behalf of one Lou Brown, a white woman who had married a negro man. In her case the writ was granted and the petitioner was discharged. On that occasion no argument was had. The case was submitted to the court upon the facts as they appeared from the petition and the return of the officer, and with what seemed to be a tacit understanding of counsel on each side, that the prisoner ought to be discharged. Such at least is my recollection of the case. My impression then was that the act of the Texas legislature of February 12, 1858, which made it a penitentiary offense for a white person to marry a negro, was obsolete and inoperative, as having been passed when the negro was a slave, and not regarded in law as a "citizen of the United States." And if not obsolete, that it was in contravention of the fourteenth amendment of the federal constitution, and of the Civil Rights Bill, because it inflicted a penalty upon the white person alone. At a subsequent period, the precise question came before the Texas court of appeals, in the case of *Frasher v. State*, Tex. Ct. App., 263. That court held that the statute in question was still in force, and was not invalidated by the adoption of the constitutional amendments, or by the Civil Rights Bill. The reasoning of the court in this case, and a more thorough consideration of the case, induce me to doubt the correctness of my first impressions when acting in the case of Lou Brown.

§ 880. *Marriage is exclusively within the control of the states.*

The subject of marriage is one exclusively under the control of each state. Each one may pass such laws as it deems proper regulating the institution. One may forbid marriage for some causes, which would be no impediment in another, and may prescribe different penalties for a violation of the same prohibition. If a state thought proper to do so, I am not satisfied that she would be prohibited by any express provision of the federal constitution, or of the Civil Rights Bill, from passing a law forbidding a marriage, among white persons, between an uncle and his niece, or between a Christian and a Jew, and imposing a penalty for its violation upon the man alone. If it could do this, then it could certainly forbid the marriage between a white person and a negro, and affix a penalty for the act upon the former alone. If the Texas statute punished the negro in such case and not the white person, then it would be clearly opposed to the Civil Rights Bill, which expressly provides that the negro shall only be subject to the like pains and penalties as the white race. But is the converse of this proposition to be held as true in all cases? Upon mature consideration, I doubt whether it is so.

§ 881. *A law punishing the white person, and not the negro, in case of inter-marriage, is not unconstitutional.*

That the law in question is unwise and unjust — that it is repugnant to the spirit of the constitution and of the Civil Rights Bill, both of which contemplate the equality of all persons before the law, and the equal protection of the

law to all — I have no doubt. At the same time, I am not satisfied that it violates the letter of either. Unless it did so, I would not feel justified in declaring it to be unconstitutional. As respects intermarriage between the white and black races, it is very certain that such a connection would rarely occur but for the influence of the former over the latter — an influence resulting from the superior education and intelligence of the whites, and the subordinate position so long held by the colored race. For such unnatural marriages, the whites are mainly to blame, and this may furnish some excuse, if not a justification, for punishing them alone, as a means of prevention. The learned counsel of petitioner has referred me to a newspaper report of a decision lately made by the circuit court of the United States in San Francisco, as supporting this application for a writ of *habeas corpus*. It is the case of *Ah Kow v. Nunan* [5 Saw., 552], sheriff of the city and county of San Francisco. Without attempting to analyze the facts of the case, it seems to me they are so wholly different from the present as to render the decision of the court therein wholly inapplicable. As before stated, I regard the act of the Texas legislature as being unjust in its discrimination against the white race, and as contrary to the spirit of the constitution; but inasmuch as it relates to a subject over which the state has complete and exclusive control, and because I doubt whether it can be properly held to be a violation of the letter of the constitution, or of any law made in pursuance thereof, the application for the writ of *habeas corpus* must be refused.

PACE v. ALABAMA.

(16 Otto, 583-585. 1882.)

ERROR to the Supreme Court of Alabama.

STATEMENT OF FACTS.—Pace, a negro man, and Mary J. Cox, a white woman, were indicted in Alabama for living together in fornication. They were convicted and sentenced to two years' imprisonment each in the penitentiary. The law of Alabama prescribes a much more severe punishment for this offense where the parties are of different colors than where they are of the same race and color.

Opinion by MR. JUSTICE FIELD.

The counsel of the plaintiff in error compares sections 4184 and 4189 of the code of Alabama, and assuming that the latter relates to the same offense as the former, and prescribes a greater punishment for it because one of the parties is a negro, or of negro descent, claims that a discrimination is made against the colored person in the punishment designated, which conflicts with the clause of the fourteenth amendment prohibiting a state from denying to any person within its jurisdiction the equal protection of the laws.

§ 882. *A law punishing adultery between persons of different races more severely than when the offense is committed by persons of the same race is valid.*

The counsel is undoubtedly correct in his view of the purpose of the clause of the amendment in question, that it was to prevent hostile and discriminating state legislation against any person or class of persons. Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment. Such was the view of congress in the enactment of the Civil

Rights Act of May 31, 1870, ch. 114, after the adoption of the amendment. That act, after providing that all persons within the jurisdiction of the United States shall have the same right, in every state and territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, declares, in section 16, that they "shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."

The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offense for which the plaintiff in error was indicted when committed by a person of the African race and when committed by a white person. The two sections of the code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.

*Judgment affirmed.*

#### EX PARTE KINNEY.

(Circuit Court for Virginia: 3 Hughes, 9-23. 1879.)

STATEMENT OF FACTS.—Kinney's petition for a writ of *habeas corpus*, addressed to the judges of the United States circuit court for Virginia, states in effect that he is confined in the penitentiary for alleged violation of a law of the state of Virginia, by marrying Mary Hall, a white woman, being himself a negro. He states that he and said Mary Hall were married in the District of Columbia, where such marriages are lawful.

Opinion by HUGHES, J.

The question presented by this petition involves so seriously the relations of the federal courts to the laws of the states and their administration by state tribunals, that I shall be excused for giving a carefully considered and pains-taking explanation of the ground of my action in this matter. Leaving out of the text such words and clauses as have no application to the case, the following are the provisions of law relating to the jurisdiction of this court on the question of awarding a writ of *habeas corpus* on this petition.

§ 883. *Writs of habeas corpus where the petitioner is held under state process.*

Section 753 of the Revised Statutes of the United States provides that the writ of *habeas corpus* shall, in no case, extend to a prisoner in jail, unless (among other instances, of which this is not one) "where he is in custody in violation of the constitution or a law of the United States." Section 754 re-

quires that the application for the writ shall be in writing, setting out the facts concerning the petitioner's detention, verified by affidavit; and section 755 authorizes the writ to issue, "unless it appears from the petition itself that the applicant is not entitled thereto." The writ, therefore, is not issued as a matter of course. Whether it shall go out or not depends upon the facts presented by the petition, showing whether or not the petitioner's detention in jail is in violation of the constitution or a law of the United States. If it appears from the petition itself that the constitution or a law of the United States has not been violated in the petitioner's arrest and imprisonment, then, of course, the writ must not go out. It is essential, therefore, to inquire whether, in the facts stated by the petition, the constitution or any law of the United States has been violated; and first, I will consider whether there has been a violation of the constitution. It must not be forgotten that the federal courts are forbidden to issue the writ of *habeas corpus* in favor of a prisoner in jail under conviction of a state court, unless the petition itself makes a case for jurisdiction under section 753. I am to inquire whether the averments in this petition release me from that inhibition. I can imagine no subject on which the federal courts ought to be more considerate in assuming jurisdiction. The petitioner here is a negro man; but the question of issuing the writ does not turn upon any provision of the constitution relating particularly to race or color. It is only the fifteenth amendment which makes special mention of that subject, in providing that the right of a citizen of the United States to vote shall not be denied or abridged on account of race or color. No other provision relates particularly to the distinction of race or color. And as no question of voting is raised in this case, we have no concern with the fifteenth amendment.

§ 884. *The federal constitution does not forbid the states to abridge the right of marriage.*

The question here is one of marrying, and there is nothing in the national constitution expressly forbidding a state from abridging the right of marrying, or indeed any right but that of voting, on account of race or color. The fifteenth amendment embodies the implication that a state may abridge any privileges of its citizens other than that of voting. No provision of the constitution relating particularly to the colored man as such has been violated by the state of Virginia in the prosecution, conviction and imprisonment of this petitioner.

§ 885. *The fourteenth amendment does not forbid a state to abridge the privileges of its own citizens.*

If any constitutional provision has been violated at all, it is only some general provision relating to the rights and privileges of citizens at large. Is it contended that the first section of the fourteenth amendment has been violated? That section declares that "all persons born in the United States are citizens of the United States and of the state wherein they reside," and provides that "no state shall make or enforce any law which shall abridge the privileges of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws." This section, after declaring that all persons born in the United States shall be citizens (1) of the United States and (2) of the state wherein they reside, goes on in the same sentence to provide that no state shall abridge the privileges of citizens of the United States; but does not go on to forbid a state from abridging the privileges of its own citizens. Leaving the matter of abridging the privileges of its own citizens to the discretion of each state, the section proceeds, in regard to the latter, only to provide that



no state "shall deny to any person within its jurisdiction the equal protection of the laws."

§ 886. *Privileges under the fourteenth amendment.*

Thus it is seen that the fourteenth amendment itself classifies the privileges of citizens into those which they have as "citizens of the United States," and those which they have as "citizens of the state wherein they reside;" and this classification has been abundantly recognized, illustrated and enforced by the supreme court of the United States in numerous decisions. See *Dartmouth College v. Woodward*, 4 Wheat., 629 (§§ 2099-2117, *infra*); *Gibbons v. Ogden*, 9 Wheat., 203 (§§ 1183-1201, *infra*); *City of New York v. Miln*, 11 Pet., 133 (§§ 1274-83, *infra*); *Scott v. Sandford*, 19 How., 404; *License Tax Cases*, 5 Wall., 471; *Paul v. Virginia*, 8 Wall., 180 (§§ 1052-59, *infra*); *United States v. Devitt*, 9 Wall., 41; *Slaughter-House Cases*, 16 Wall., 36 (§§ 752-801, *supra*); *United States v. Reese*, 2 Otto, 214 (§§ 1568-86, *infra*); and *United States v. Cruikshank*, 2 Otto, 542 (§§ 898-911, *infra*). See, also, *Corfield v. Coryell*, 4 Wash., 371; *United States v. Petersburg Judges of Election*, 1 Hughes, 505; and the *Federalist*, No. 45.

§ 887. *Rights of a citizen of a state.*

The rights which a person has as a citizen of a state are those which pertain to him as a member of society, and which would belong to him if his state were not a member of the American Union. Over these the states have the usual powers belonging to government; and these powers "extend to all objects which, in the ordinary course of affairs, concern the lives, liberties (privileges) and properties of the people; and of the internal order, improvement and prosperity of the state." *Federalist*, No. 45. "The framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and the instrument they have given us is not to be so construed." Chief Justice Marshall, speaking specially of marriage, in the *Dartmouth College Case*, 4 Wheat., 629 (§§ 2099-2117, *infra*). Their powers extend, of course, to the control of the domestic relations of all classes of citizens of a state.

§ 888. *Rights of a citizen of the United States.*

On the other hand, the rights which a person has as a citizen of the United States are such as he has by virtue of his state being a member of the American Union under the provisions of our national constitution. For instance, a man is a citizen of a state by virtue of his being native and resident there; but if he emigrates into another state he becomes at once a citizen there by operation of the provision of the constitution of the United States making him a citizen there; and he needs no special naturalization, which, but for the constitution, he would need, to become such a citizen. Again, if a citizen of Virginia is allowed by her laws to carry on a business by paying a certain tax, a citizen of Maryland who comes into Virginia and pays the tax is entitled, under the national constitution, to carry on the same business in Virginia. The Virginian carries on the business here by right of his state citizenship; the Marylander carries it on here by right of his national citizenship. In the *Slaughter-House Cases* the supreme court of the United States had under review an act of the legislature of Louisiana incorporating a company and conferring upon it the exclusive privilege of slaughtering animals within a defined area adjoining the city of New Orleans. Certain butchers of the vicinity, who were thus deprived of the privilege of exercising their trade in that area, assailed the charter as contrary to the provision of the fourteenth amendment of the na-

tional constitution, quoted above. But the supreme court held that the privilege of butchering animals was of the class belonging to persons as citizens of their state, and not belonging to them as citizens of the United States. It therefore held that the legislative act abridging this right of the New Orleans butchers, and confining it exclusively to a favored corporation, did not violate the fourteenth amendment or any law passed under it, and could not be the subject of relief by a federal court, however unjust the state law.

In the light of this commentary, can it be intelligently contended that the laws of Virginia relating to marriage are obnoxious to the fourteenth amendment? These laws are as follows: The ninth section of chapter 104 of the code of Virginia provides that "no man shall marry his mother, grandmother, step-mother, sister, daughter, granddaughter, half-sister, aunt, son's widow, wife's daughter, or her grandmother or step-mother, brother's daughter or sister's daughter." The tenth section of the same chapter provides that no woman shall marry within degrees correlative with those defined in the ninth section. Among still other inhibitions of marriage, the same code, in the first section of chapter 105, provides that "all marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living, shall be absolutely void, without any decree of divorce or other legal process." The penal provisions are as follows: "If any person marry in violation of the ninth or tenth section of chapter 104 of the code, he shall be confined in jail not more than six months, or fined not exceeding \$500, at the discretion of the jury. Any white person who shall intermarry with a negro, or any negro who shall intermarry with a white person, shall be confined in the penitentiary not less than two nor more than five years." Criminal Revisal of 1878, chapter 8, sections 3 and 8.

§ 889. *Marriage is a privilege belonging to persons as members of society, and may be abridged and regulated by state laws.*

It is clear that I am bound by the authorities which have been cited to treat the privilege of marriage as belonging to the class which a person has as a member of society, and not to the class which he has by virtue of the state in which he resides being a member of the American Union. If Virginia were in the mid-ocean or on the antipodal continent, her control over the rights and privileges of her citizens as members of society, including marriage, would be, no more certainly than now, unrestrained by any provision of the national constitution. The right to enact as law any one of the three prohibitions of marriage which have been quoted from the code, as between her own citizens residing within her own territory, is as clear as the right to make the other two. With the propriety, policy or justice of such laws a court of the United States has nothing to do. As individual citizens, their judges might possibly question the policy of such a state law, but as judicial officers they can only inquire what is the law. The fourteenth amendment gives no power to congress to interfere with the right of a state to regulate the domestic relations of its own citizens, and if a state enact such laws as those which have been quoted, the federal courts must respect them as they stand, without inquiring into the reasons of them. However harsh a state law may be, they can only say, with Ulpian, "*Hoc quidem perquam durum est, sed ita lex scripta est.*"

§ 890. *The fourteenth amendment grants equality of protection but not equal privileges.*

The clause of the fourteenth amendment under review makes a further distinction. After declaring that no state shall make any law which shall abridge

the privileges of citizens of the United States, it adds: "Nor deny to any person within its jurisdiction the equal protection of the laws." Here is a distinction between citizens of the United States and "any persons," whether citizen or alien, residing or happening to be within the borders of a state. The declaratory clause forbids any abridgment of the rights of citizens of the United States. The remedial clause gives equal protection to all persons whatever while within a state's borders. The amendment does not provide that the privileges shall be equal, but it does provide that protection shall be equal. It establishes equality between all persons in their right to protection, but does not confer equality in the privileges they are to enjoy. It provides that whatever privileges the constitution and laws of the United States confer upon a citizen as a citizen of the United States shall be enjoyed without abridgment; and it provides that all persons within a state, whether a citizen of the United States, or of the states, or aliens, shall be equally protected by the laws in whatever privileges, whether equal or not equal, they may have from the United States or from the state. However unequal their privileges respectively, yet a foreigner, a citizen of another American state, and a citizen of the state, shall have the benefit equally in the state of all remedial laws for the recovery of rights, and of all legal safeguards ordained for the protection of life, liberty and property.

§ 891. *A law which prohibits white and colored persons intermarrying denies no equality of privilege.*

I think it plain from this review that an equality of privileges is not enforced by the constitution upon a state in respect to its domestic laws, for the government of its own citizens as such, while they are within its jurisdiction. But even if it did require an equality of privileges, I do not see any discrimination against either race in a provision of law forbidding any white or colored person from marrying another of the opposite color of skin. If it forbids a colored person from marrying a white, it equally forbids a white person from marrying a colored. In its terms, and, for all I know, in its spirit, the law is a prohibition put upon both races alike and equally. In the present case, the white party to the marriage is in imprisonment as well as the colored person. I think it clear, therefore, that no provision of the fourteenth amendment has been violated by the state of Virginia in its prosecution of this petitioner. It would seem to follow from this conclusion that no act of congress passed to enforce that amendment is violated; and I know of none that can be claimed to have been, unless it be the first section of the Civil Rights Act of 1866, now section 1977 of the Revised Statutes, which provides that "all persons within the jurisdiction of the United States shall have the same right in every state to make and enforce contracts as is enjoyed by white citizens, and shall be subject to like punishments," etc. As to punishments, I have just shown that the penalty of the state law is denounced equally and alike upon the white and colored persons who contract the illegal marriage with each other. As to rights, this is a law for the enforcement of that clause of the fourteenth amendment which requires a state to give the equal protection of the laws to all persons within its borders. All are permitted to make and enforce contracts; not, indeed, any sort of contracts which they may see fit to make, *e. g.*, polygamous or incestuous contracts of marriage, or usurious contracts for money, but such contracts as are lawful. It is for a state and for congress, each within its respective sphere of constitutional authority, to say what shall be lawful contracts, and it is only such as are legal that can be made and en-

forced within the state by "all persons within the jurisdiction of the United States." Provided the state law does not abridge a right which a person has in his character of a citizen of the United States, of which marriage, as we have seen, is not one, the state may declare at will what contracts are and what are not legal within its jurisdiction, and section 1977 confers the right of enforcing only such contracts as are legal.

§ 892. *Marriage is not within the protection of the constitution prohibiting laws impairing the obligation of contracts.*

Congress has made no law relating to marriage. It has not simply because it has no constitutional power to make laws affecting the domestic relations and regulating the social intercourse of the citizens of a state. If it were to make such a law for the states, that law would be unconstitutional, and the federal courts would not hesitate to declare it so. It is the state which is endowed with the sovereign power of making such laws, and therefore only those contracts of marriage that are legal under state laws can be enforced or enjoyed within the jurisdiction of the state.

All this has been said on the hypothesis that the contract of marriage is subject, like pecuniary contracts, to the operation of section 1977. But marriage is more than a contract. It may be entered into at the will of competent parties, but it cannot, as other contracts may, be released at their will. Nor can its terms be shaped at their will; it cannot be for so many years and then cease, for it must be "until death do us part;" it cannot be entered into with one or more of the opposite sex at pleasure, but must be with one only, for the joint lives; it cannot be confined in effect to a single territorial jurisdiction, but has the same effect all over the world, so far as permitted by the law of each state or nation. It is plain, therefore, that marriage is not, in many of its qualities, of the class of contracts contemplated by section 1977 of the Revised Statutes; and in the Dartmouth College Case, 4 Wheat., 629 (§§ 2099-2117, *infra*), it was held by the supreme court of the United States that the clause of article 1, section 10, of the national constitution, forbidding a state from passing any law impairing "the obligation of contracts," does not embrace marriage, it never having been intended to forbid a state legislature to pass an act of divorce or an act conferring power upon state courts to grant decrees of divorce; the supreme court being of opinion that the contracts contemplated by the clause were only such as relate to property or pecuniary values. 1 Minor's Inst., 275. Thus we see, from another point of view, that marriage is not one of the "privileges" in regard to which the national constitution and congress can restrict the power of the states. It is clear, on the whole, that section 1977 is not violated by the marriage laws of Virginia, and I know of no other act of congress that has been, considering the petitioner and his consort as citizens of Virginia, and treating their case as if the marriage had been entered into in this state.

§ 893. *The second section of article 4 of the constitution does not enable one married in other jurisdiction to come into a state where the marriage would have been prohibited and reside there contrary to its laws.*

But this marriage was not entered into here. The parties to it went to the District of Columbia for the purpose of contracting it; did there contract it, and returned to reside and cohabit together in this state. Yet this is not the case of citizens of another state, lawfully married in that domicile, afterward migrating thence in good faith into this state. If this petitioner had been a born citizen of the District of Columbia, and had there married a white

woman in conformity to the laws of that jurisdiction, and had afterward migrated with his lawful wife to Virginia, and had been, after becoming thus domiciled here, prosecuted under that provision of the law of Virginia which has been quoted, and convicted and imprisoned, and had filed his petition here, praying for an inquiry into the cause of his detention in prison, the cause presented would have been essentially different from that actually under consideration. Then the question would have been whether such citizens of another state could claim here the protection of the second section of the fourth article of the national constitution. This section declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." At first blush it would seem that this provision would give a citizen of the District of Columbia, lawfully married as a citizen there, and afterward domiciliating here, the right to reside here under that marriage. But even in such a case the supreme court has decided otherwise. That such a citizen would have a right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence, may be conceded, because those are privileges following a citizen of the United States, as given by the section of the constitution just quoted, and by the clause of the fourteenth amendment previously considered. But it is equally true that such a citizen could not, by becoming a citizen of Virginia, bring here the privilege of exercising as such a right legally enjoyed in the District, but not given here. In the case of *Paul v. Virginia*, 8 Wall., 180 (§§ 1052-59, *infra*), the supreme court of the United States held that "special privileges enjoyed by citizens in their own states are not secured to them in other states" by the provision of the fourth article of the constitution which has been quoted. Reviewing its decision in *Bank of Augusta v. Earle*, 13 Pet., 586, the court said that it was never intended by this provision to give to citizens from another state higher and greater privileges in any state than are enjoyed by citizens of that state; that it "was not intended by the provision to give to laws of one state any operation in other states; that they can have no such operation except by the permission, express or implied, of those states; and that the special privileges which they confer must be enjoyed at home, unless the assent of other states to their enjoyment therein be given" (pp. 180, 181 of Wallace). The provision of the constitution in question refers to the privileges given in the state into which the citizen goes, and not to those given in the state from which he comes. And so, even if this petitioner had been a citizen of another state, lawfully married there, and had come here bringing his wife, intending to live here in a condition of matrimony forbidden by our laws, he could not claim the protection of the national constitution, or of any law of congress, in thus violating our laws.

§ 894. *A marriage contracted out of a state, for the purpose of evading its marriage laws, is not protected by the federal constitution.*

But the case of the petitioner is weaker than that just supposed. He and his consort were citizens of Virginia. They went abroad to be married in evasion of her laws, and they returned to cohabit together here in violation of them. The marriage certificate gives Virginia as the petitioner's residence, and his going to the District of Columbia was plainly an act in *fraudem legis domesticæ*. The question whether a marriage illegal at home, and contracted in another place to which the parties had gone in intentional evasion of the domestic law, should be treated as valid by the home state on their resuming residence within it, has been much discussed by learned jurisconsults, such as

Burge, Huber, Savigne, Pothier, Lord Mansfield, Lord Campbell, Lord Cranworth, Story, Kent, Wharton and others, whose opinions have been divided. But the question thus discussed has supposed the non-existence of punitive law in the home state. It has been on the question whether the courts of the home state should, in the absence of statutory law, treat the marriage as valid in comity to the state where it was contracted; all writers conceding to the home state the power of adopting punitive laws forbidding the privilege of cohabitation at will. For I think I do not go too far when I assert it as a principle now well settled, that a "state may follow its citizens abroad and attach to acts done there the same consequences as if done at home, and that though the law of the place of a marriage may determine its forms and regularity, yet the law of the domicile of the parties must decide whether the contract was one which might be lawfully made;" and this unquestionably is the rule in regard to marriages polygamous, incestuous, and contrary to public policy. Our own court of appeals has so decided in *Kinney v. Commonwealth*, 2 Va. L. J., 632, following the English House of Lords in the case of *Brook v. Brook*, 9 H. of L. Cas., 193. So, also, have the supreme courts of North Carolina, South Carolina and Louisiana, in *Williams v. Oates*, 5 Ired., 538; *State v. Kenney*, 76 N. C., 351; *State v. Ross*, 77 id., and Cent. L. J. for April, 1877, and *Duprè v. Bonead*, 10 La. Ann., 411. But the supreme court of Massachusetts, in *Medway v. Needham*, 16 Mass., 157, and that of Kentucky, in *Stevenson v. Gray*, 17 B. Mon., 192, have decided contrariwise.

The question can no longer be treated as open, however, in Virginia, whose legislature has recently, in the Criminal Revisal of March 14, 1878, chapter 7, section 3, declared that "If any person, resident in this state, and within the degrees of relationship mentioned in the ninth and tenth sections of chapter 104 of the code, or any white person and negro, shall go out of the state for the purpose of being married, and with the intention of returning, and be married out of it, and afterward return to and reside in it, cohabiting as man and wife, they shall be as guilty, and be punished, as if the marriage had been in this state."

Now there are many illegal marriages other than those named in the foregoing penal section, of which, though illegal here, Virginia takes no notice if contracted without her jurisdiction. The ordinary "runaway matches" so frequent in this country, and those known as Gretna Green marriages in England, are not placed in either country under the ban of annulling or penal statutes, but, on the principle of interstate comity, are allowed to stand good. It is only marriages which are polygamous, incestuous, or contrary to public policy, which are made the subject of penal exactments, such as that of the third section of chapter 7 of our Criminal Revision, just given. This petitioner is here, not as a citizen of the District of Columbia, to which he went to be married in evasion of the laws of Virginia, but as a citizen of Virginia, amenable to her laws. He is here in that character only, and has brought back no other right in regard to the marriage which he made abroad than he took away. He cannot bring the marriage privileges of a citizen of the District of Columbia, any more than he could those of a citizen of Utah, into Virginia, in violation of her laws. It was competent for the state of Virginia, so far as there is anything in the constitution and laws of the United States to prevent, to enact the law just quoted under which the petitioner was convicted, and therefore his case is beyond relief from a federal court.

§ 895. *Marriage is not one of the things to which the states must give full faith and credit.*

I know it is claimed that the provision of the fourth article of the national constitution, which requires each state to "give full faith and credit to the public acts, records and judicial proceedings of the other states," has an important bearing on the present case. I have already abundantly shown that it cannot have the effect of making the laws of one state the laws of another. It is doubtful whether the marriage certificate of a clergyman or magistrate is a "public" record in the meaning of this provision of the constitution. But whether it be or not, the clause in question could only go to the extent of rendering indisputable the fact of the marriage and of its legality in the place of contract. To give to public records "full faith and credit is to attribute to them positive and absolute verity, so that they cannot be contradicted or the truth of them be denied any more than in the state where they originated." Story on the Constitution, section 1310. "A court is bound to take judicial notice of the public records of another state." *Owings v. Hull*, 9 Pet., 627. "A judgment in one state is a judgment in another, only so far as to preclude inquiry as to the merits of the subject-matter of the original judgment." *McElmoyle v. Cohen*, 13 Pet., 312. So that a money judgment obtained in the courts of another state is not a judgment here, but only a chose in action, requiring to be specially sued upon in this state. A public record certifying a marriage to have been legally contracted and valid there, though indisputable proof here of those two facts, yet does not convert the fact of validity there into validity here, contrary to the express local law. It has never been pretended that the laws of a state can, by the acts of individuals, be subordinated within its own jurisdiction to the laws established by another state. A citizen of Virginia may go to the federal District of Columbia, or to the federal territory of Utah, and be married there in conformity to the local laws, and may remain there as a resident and citizen with impunity. But if his object in going was to evade the laws of Virginia, and if, after marriage, he returns here and remains in a condition of matrimony forbidden by our laws, the certificate of his marriage in the District or territory, in conformity to its laws, will have no other value here than as indisputable proof of his violation of our laws.

On the whole, I am of opinion that the law of Virginia under which this petitioner is detained in prison by the state does not violate the constitution or any law of the United States, and that I have consequently no jurisdiction to grant the relief for which the petitioner prays. The writ of *habeas corpus* is denied.

BERTONNEAU v. DIRECTORS OF CITY SCHOOLS.

(Circuit Court for Louisiana; 8 Woods, 177-182. 1878.)

This was a bill by a citizen of Louisiana, of African descent, against the directors of the schools of the city of New Orleans, alleging that his children were not permitted to attend the schools provided for white children. The facts are stated by the court.

Opinion by Woods, J.

There is no complaint in the bill that complainant's children are excluded from the public schools of the state on account of their race and color or for any other reason. Nor is there any averment that the public schools which are open to complainant's children are in any respect whatever inferior to the schools where the children of the white race are educated.

§ 896. *The states may provide for the separate education of the races.*

The grievance, and the sole grievance, set out in the bill is that complainant's children, being of African descent, are not allowed to attend the same public schools as those in which children of white parents are educated. Is this a deprivation of a right granted by the constitution of the United States? The complainant says that the action of the defendants deprives him and his children of the equal protection of the laws, and therefore impairs a right granted to him and them by the fourteenth amendment to the constitution of the United States, and the act of congress passed to secure the same. Is there any denial of equal rights in the resolution of the board of directors of the city schools, or in the action of the subordinate officers of the schools, as set out in the bill? Both races are treated precisely alike. White children and colored children are compelled to attend different schools. That is all. The state, while conceding equal privileges and advantages to both races, has the right to manage its schools in the manner which, in its judgment, will best promote the interest of all. The state may be of opinion that it is better to educate the sexes separately, and therefore establishes schools in which the children of different sexes are educated apart. By such a policy can it be said that the equal rights of either sex are invaded? Equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age, in the same school. Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the constitution of the United States. Equality of rights does not necessarily imply identity of rights.

These views have been held by the supreme court of Ohio, in respect to a law under which colored children were not admitted as a matter of right into the schools for white children. *State v. McCann*, 21 Ohio St., 198. See, also, *State v. Duffy*, 7 Nev., 342, where substantially the same doctrine is held. See, also, the concurring opinion of Mr. Justice Clifford, in *Hall v. De Cuir*, 95 U. S., 485 (§§ 1140-63, *infra*). In the state of Georgia there is a law forbidding the intermarriage of white persons and persons of African descent.

It was held by Judge Erskine, of the United States court, that this law was not obnoxious to the fourteenth amendment to the constitution. *Ex rel. Hobbs*, 1 Woods, 537. The argument in support of this decision is that the law applies with equal force to persons of both races. Its prohibition applies alike to black and white, and the penalty for disobedience falls with equal severity on both. These authorities, it seems to me, fully sustain the views above announced by this court.

§ 897. *This court has no jurisdiction of suits respecting alleged violations of state laws or of a state constitution, unless such violation impairs rights guaranteed by the constitution of the United States.*

But complainant contends that, by the constitution of the state of Louisiana, separate schools for white and colored children are prohibited; that the actings and doings of defendants set out in the bill are in violation of the plaintiff's right under the constitution of the state, and is a denial to plaintiff of the equal protection of the laws of the state, and that the board of the city schools, and the other defendants in the bill, in this matter represent the state; that their acts are the acts of the state, and, consequently, that the clause of the fourteenth amendment to the constitution of the United States which declares "no state shall deny to any person within its jurisdiction the equal protection of the laws," applies to this case. Whether the board of directors of city



schools, Rogers, the chief superintendent of schools, and Gordon, the principal of the Fillmore school, are the state of Louisiana, or represent the state of Louisiana, so that their acts are to be considered the acts of the state, it is unnecessary now to decide. Conceding for the present that their acts are the acts of the state, does it follow that this court can take cognizance of their doings, under that clause of the constitution relied on?

If I am not in error in holding that the requiring of white and colored children to attend separate schools, even when such schools are supported at the public cost, does not deprive either class of their equal rights, it would follow that as between citizens of the same state, this court has no jurisdiction of the case presented by the bill. If I am right in the view presented, the claim of complainant amounts to this: that this court, without regard to the citizenship of the parties, has authority to inquire into every violation of a state law or state constitution by the officers of the state. This court does not sit to supervise the conduct of state officers, unless it impairs some right granted by the constitution of the United States, or unless the citizenship of the parties to the suit gives the court jurisdiction. Generally we are authorized to enforce or administer the state laws only when there is a controversy between citizens of different states. As the bill does not present the case of an impairment of a right granted by the constitution of the United States, and as all the parties to it are citizens of the state of Louisiana, it does not disclose any case of which this court can take jurisdiction. The demurrer must therefore be maintained.

UNITED STATES *v.* CRUIKSHANK.

(2 Otto, 542-569. 1875.)

ERROR to U. S. Circuit Court, District of Louisiana.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This case comes here with a certificate by the judges of the circuit court for the district of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon section 6 of the Enforcement Act of May 31, 1870. That section is as follows: "That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed \$5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit or trust created by the constitution or laws of the United States." 16 Stat., 141.

The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts, and is stated to be, whether "the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States." The general charge in the first eight counts is that of "banding," and in the second eight that of "conspiring," together to

injure, oppress, threaten and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution and laws of the United States."

§ 898. *Requisites of an indictment under section 6 of the Enforcement Act.*

The offenses provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of congress.

§ 899. *Citizenship; powers of government.*

We have in our political system a government of the United States and a government of each of the several states. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state, but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughter-House Cases*, 16 Wall., 74 (§§ 752-801, *supra*). Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction, but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose. Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate states, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated states. For this reason the people of the United States, "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty" to themselves and their posterity (Const., Preamble), ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action. The government thus established and defined is to some extent a government of the states in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the states, but beyond it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment

of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

The people of the United States resident within any state are subject to two governments, one state and the other national; but there need be no conflict between the two. The powers which one possesses the other does not. They are established for different purposes and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a state, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the state by the breach of peace, in the assault. So, too, if one passes counterfeited coin of the United States within a state, it may be an offense against the United States and the state — the United States because it discredits the coin, and the state because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return he can demand protection from each within its own jurisdiction.

§ 900. *The federal government is one of delegated authority. The right of the people peaceably to assemble together for lawful purposes is not a right granted by the constitution.*

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the constitution. All powers not granted to it by that instrument are reserved to the states or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states.

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the constitution or laws of the United States. The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the constitution of the United States. In fact it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat., 211 (§§ 1183-1201, *infra*), "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the constitution. The

government of the United States when established found it in existence, with the obligation on the part of the states to afford it protection. As no direct power over it was granted to congress, it remains, according to the ruling in *Gibbons v. Ogden*, id., 203, subject to state jurisdiction. Only such existing rights were committed by the people to the protection of congress as came within the general scope of the authority granted to the national government.

§ 901. *The first amendment to the constitution, prohibiting congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances," was not intended to limit the powers of the state governments in respect to their own citizens.*

The first amendment to the constitution prohibits congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the state governments in respect to their own citizens, but to operate upon the national government alone. *Barron v. Mayor and City Council of Baltimore*, 7 Pet., 250; *Livingston v. Moore*, id., 551 (§§ 1835-44, *infra*); *Fox v. State of Ohio*, 5 How., 434 (§§ 496-500, *supra*); *Smith v. State of Maryland*, 18 id., 76; *Withers v. Buckley*, 20 id., 90 (§§ 207-209, *supra*); *Pervear v. The Commonwealth*, 5 Wall., 479; *Twitchell v. The Commonwealth*, 7 id., 321; *Edwards v. Elliott*, 21 id., 557. It is now too late to question the correctness of this construction. As was said by the late chief justice, in *Twitchell v. The Commonwealth*, 7 Wall., 325, "the scope and application of these amendments are no longer subjects of discussion here." They left the authority of the states just where they found it, and added nothing to the already existing powers of the United States. The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by congress. The right was not created by the amendment; neither was its continuance guarantied, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the states. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

§ 902. *Powers of congress extend to punishing those who prevent citizens from assembling only when they so assemble to petition congress for a redress of grievances, or other matters connected with the powers of the national government.*

The right of the people peaceably to assemble for the purpose of petitioning congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and as such, under the protection of, and guarantied by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offense, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

§ 903. *The right "of bearing arms for a lawful purpose" is not a right granted by the constitution.*

The second and tenth counts are equally defective. The right there specified

is that of "bearing arms for a lawful purpose." This is not a right granted by the constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *City of New York v. Miln*, 11 Pet., 139 (§§ 1274-83, *infra*), the "powers which relate to merely municipal legislation, or what was perhaps more properly called internal police," "not surrendered or restrained" by the constitution of the United States.

§ 904. *Congress cannot punish for conspiracy falsely to imprison or murder within a state.*

The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the state of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the declaration of independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the states, when they entered into the Union under the constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the states. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state, than it would be to punish for false imprisonment or murder itself.

§ 905. *The fourteenth amendment secures no protection as between individuals.*

The fourteenth amendment prohibits a state from depriving any person of life, liberty or property without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 4 Wheat., 244 (§§ 2522-25, *infra*), it secures "the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

§ 906. *The indictment must allege that the acts were on account of race and color.*

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in "the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said state of Louisiana and by the United States; and then and there, at that time, being in force in the said state and district of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time, enjoyed at and within said state and district of Louisiana by white persons, being citizens of said state of

Louisiana and the United States, for the protection of the persons and property of said white citizens." There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the state of Louisiana, from enjoying the equal protection of the laws of the state and of the United States.

§ 907. *The fourteenth amendment merely empowered congress to see that the states impaired no one's rights.*

The fourteenth amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guaranties, but no more. The power of the national government is limited to the enforcement of this guaranty. No question arises under the Civil Rights Act of April 9, 1866 (14 Stat., 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, because, as has already been stated, it is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color. Another objection is made to these counts, that they are too vague and uncertain. This will be considered hereafter, in connection with the same objection to other counts.

§ 908. *The constitution has not conferred the right of suffrage upon any one.*

The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent and colored, "in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said state of Louisiana, or by the people of and in the parish of Grant aforesaid." In *Minor v. Happersett*, 21 Wall., 178 (§§ 806-815, *supra*), we decided that the constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the states. In *United States v. Reese*, 2 Otto, 214 (§§ 1568-86, *infra*), we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the constitution of the United States; but the last has been.

§ 909. — *it only prohibits discrimination on account of race and color.*

Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote

on account of their race, etc., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States. We may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense, and cannot be supplied by implication. Everything essential must be charged positively and not inferentially. The defect here is not in form but in substance.

§ 910. *Counts in an indictment which charge really nothing more than a conspiracy to commit a breach of the peace within a state cannot bring the party within the jurisdiction of the United States.*

The seventh and fifteenth counts are no better than the sixth and fourteenth. The intent here charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted "at an election before that time had and held according to law by the people of the said state of Louisiana, in said state, to wit, on the 4th day of November, A. D. 1872, and at divers other elections by the people of the state, also before that time had and held according to law." There is nothing to show that the elections voted at were any other than state elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a state. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the states. If a state cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the constitution (art. 4, sec. 4); but it applies to no case like this.

We are, therefore, of the opinion that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and that consequently they are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the constitution.

§ 911. *In criminal cases under the laws of the United States, the accused has the constitutional right to be informed of the nature and cause of the accusation.*

We come now to consider the fifth and thirteenth and the eighth and sixteenth counts, which may be brought together for that purpose. The intent charged in the fifth and thirteenth is "to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities and protection granted and secured to them respectively as citizens of the United States, and as citizens of said state of Louisiana," "for the reason that they, . . . being then and there citizens of said state and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof;" and in the eighth and sixteenth, to hinder and prevent them "in their several and respective free exercise and enjoyment of every, each, all and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States." The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts. According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offense in the language

of the statute, but whether the offense has here been described at all. The statute provides for the punishment of those who conspire "to injure, oppress, threaten or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States." These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all and singular" the rights granted them by the constitution, etc. There is no specification of any particular right. The language is broad enough to cover all.

In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." Amend. VI. In *United States v. Mills*, 7 Pet., 142, this was construed to mean that the indictment must set forth the offense "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in *United States v. Cook*, 17 Wall., 174, that "every ingredient of which the offense is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. 1 Arch., Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.

It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some states a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal. *State v. Parker*, 43 N. H., 83; *State v. Keach*, 40 Vt., 118; *Alderman v. The People*, 4 Mich., 414; *State v. Roberts*, 34 Me., 32. In Maine, it is an offense for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the state prison (*State v. Roberts*); but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all and singular the crimes punishable by imprisonment in the state prison." All crimes are not so punishable. Whether a particular crime be such a one or not is a question of law. The accused has, therefore, the right to have a



specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear — that is to say, appear from the indictment, without going further — that the acts charged will, if proved, support a conviction for the offense alleged.

But it is needless to pursue the argument further. The conclusion is irresistible that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them. The order of the circuit court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded with instructions to discharge the defendants.

MR. JUSTICE CLIFFORD concurred in the judgment, but for the reason that the indictment was insufficient.

UNITED STATES *v.* HARRIS.

(16 Otto, 629-644. 1882.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Western District of Tennessee.

STATEMENT OF FACTS.—Harris and others were indicted under Revised Statutes, section 5519, for conspiring to deprive certain citizens of the United States of the equal protection of the laws. There was a demurrer to the indictment, and the judges being divided in opinion certified the case to the supreme court, but did not state in the certificate that it was done at the request of either party.

§ 912. *On division of opinion the certificate need not state that it was granted at the request of either party.*

Opinion by MR. JUSTICE WOODS.

The certificate of division of opinion in this case does not expressly state that the point of difference between the judges was certified “upon the request of either party or their counsel.” Neither party challenges the jurisdiction of this court, but it has occurred to us as a question, and we have considered it, whether this omission in the certificate is fatal to our jurisdiction, and we have reached the conclusion that it is not. It fairly appears from the certificate that the point upon which the judges differed in opinion was stated, under their direction, in the presence of the counsel of both parties, without objection from either, and it is expressly stated that the cause was continued until the decision of this court upon the point of difference between the judges could be rendered. Had no certificate of division of opinion been made, the result must have been adverse to the sufficiency of the indictment, although the difference of opinion arose upon the demurrer of the defendants, for no judgment could have been given against them, if the judges were not agreed as to the constitutionality of the law upon which the indictment was based. Hence it became

the duty of the prosecuting officer, and the interest of the government which he represented, to request a certificate of division of opinion for the determination of the question by this court. This case is brought to this court by the counsel for the United States upon the point stated in the certificate; the case is suspended until our decision upon the point certified is made; and he asks us to decide the question upon which the judges of the circuit court differed. These circumstances, all of which appear of record, considered in connection with the fact that the court made the certificate, raise the legal presumption that a request for the certificate was duly preferred. The record evidence of the fact of the request by counsel for the United States is incontrovertible.

It is suggested that under section 649 of the Revised Statutes, which provides that a jury may be waived "whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury," this court has decided that the fact that the stipulation was in writing and filed with the clerk must appear of record in order to entitle the party to the review of the rulings of the court in the progress of the trial provided by section 700, and, therefore, that in the present case the record should distinctly show the request. But section 649 expressly requires that the waiver of the jury shall be in writing and filed with the clerk. The section which provides for a certificate of division of opinion makes no such requirement in relation to the request for a certificate. In one case the jurisdictional fact is the filing of a certain paper writing with the clerk; in the other, the making of a request, which may be oral, to the court. In either case, when the jurisdictional fact fairly appears by the record, our jurisdiction attaches. So, in this case, if the request may be fairly inferred from such circumstances as we have mentioned, that is all that is necessary to satisfy the statute. In *Supervisors v. Kennicott*, 103 U. S., 554, this court held that when a stipulation in writing was filed with the clerk, by which it was provided that the case might be submitted to the court on an agreed statement of facts, but which contained no express waiver of a jury, yet this amounted to a waiver sufficient to meet the requirements of section 649. And though the right of trial by jury is a constitutional one, yet this court has declared that when it simply appeared by the record that a party was present by counsel and had gone to trial before the court without objection or exception, a waiver of his right to a jury trial would be presumed, and he would be held in this court to the legal consequences of such waiver. *Kearney v. Case*, 12 Wall., 275. We are, therefore, of opinion that the request by counsel of the United States for a certificate of division is sufficiently shown by the record in this case, and that our jurisdiction is clear.

§ 913. *Every act of congress must find in the constitution some warrant for its passage.*

We pass to the consideration of the merits of the case. Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated. While conceding this, it must, nevertheless, be stated that the government of the United States is one of delegated, limited and enumerated powers. *Martin v. Hunter*, 1 Wheat., 304; *McCulloch v. State of Maryland*, 4 id., 316 (§§ 380-398, *supra*); *Gibbons v. Ogden*, 9 id., 1 (§§ 1183-1201, *infra*). Therefore every valid act of congress must find in the constitution some warrant for its passage. This is apparent by reference to the following provisions of

the constitution: Section 1 of the first article declares that all legislative powers granted by the constitution shall be vested in the congress of the United States. Section 8 of the same article enumerates the powers granted to the congress, and concludes the enumeration with a grant of power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof." Article X of the amendments to the constitution declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Mr. Justice Story, in his Commentaries on the Constitution, says: "Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by congress. If not, congress cannot exercise it." Sec. 1243, referring to Virginia Reports and Resolutions, January, 1800, pp. 33, 34; President Monroe's Exposition and Message of May 4, 1822, p. 47; 1 Tuck. Black. Comm. App., 287, 288; 5 Marshall's Wash. App., note 3; 1 Hamilton's Works, 117, 121.

§ 914. *The fifteenth amendment does not protect persons in the enjoyment of equal privileges.*

The demurrer filed to the indictment in this case questions the power of congress to pass the law under which the indictment was found. It is, therefore, necessary to search the constitution to ascertain whether or not the power is conferred. There are only four paragraphs in the constitution which can in the remotest degree have any reference to the question in hand. These are section 2 of article 4 of the original constitution, and the thirteenth, fourteenth and fifteenth amendments. It will be convenient to consider these in the inverse of the order stated. It is clear that the fifteenth amendment can have no application. That amendment, as was said by this court in the case of *United States v. Reese*, 92 U. S., 214 (§§ 1568-86, *infra*), "relates to the right of citizens of the United States to vote. It does not confer the right of suffrage on any one. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elective franchise on account of race, color, or previous condition of servitude." See, also, *United States v. Cruikshank*, id., 542 (§§ 898-911, *supra*); S. C., 1 Woods, 308. Section 5519 of the Revised Statutes has no reference to this right. The right guarantied by the fifteenth amendment is protected by other legislation of congress, namely, by sections 4 and 5 of the act of May 31, 1870, chapter 114, and now embodied in sections 5506 and 5507, Revised Statutes. Section 5519, according to the theory of the prosecution, and as appears by its terms, was framed to protect from invasion, by private persons, the equal privileges and immunities, under the laws, of all persons and classes of persons. It requires no argument to show that such a law cannot be founded on a clause of the constitution whose sole object is to protect from denial or abridgment, by the United States or states, on account of race, color, or previous condition of servitude, the right of citizens of the United States to vote.

§ 915. *The fourteenth amendment is a protection against acts of the state, not against acts of persons.*

It is, however, strenuously insisted that the legislation under consideration

finds its warrant in the first and fifth sections of the fourteenth amendment. The first section declares "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The fifth section declares "the congress shall have power to enforce by appropriate legislation the provisions of this amendment." It is perfectly clear from the language of the first section that its purpose also was to place a restraint upon the action of the states. In *Slaughter-House Cases*, 16 Wall., 36 (§§ 752-801, *supra*), it was held by the majority of the court, speaking by Mr. Justice Miller, that the object of the second clause of the first section of the fourteenth amendment was to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States; and this was conceded by Mr. Justice Field, who expressed the views of the dissenting justices in that case. In the same case the court, referring to the fourteenth amendment, said that "if the states do not conform their laws to its requirements, then by the fifth section of the article of amendment congress was authorized to enforce it by suitable legislation."

The purpose and effect of the two sections of the fourteenth amendment above quoted were clearly defined by Mr. Justice Bradley in the case of *United States v. Cruikshank*, 1 Woods, 308, as follows: "It is a guaranty of protection against the acts of the state government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state, not a guaranty against the commission of individual offenses; and the power of congress, whether express or implied, to legislate for the enforcement of such a guaranty does not extend to the passage of laws for the suppression of crime within the states. The enforcement of the guaranty does not require or authorize congress to perform 'the duty that the guaranty itself supposes it to be the duty of the state to perform, and which it requires the state to perform.'" When the case of *United States v. Cruikshank* came to this court, the same view was taken here. The chief justice, delivering the opinion of the court in that case, said: "The fourteenth amendment prohibits a state from depriving any person of life, liberty or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guaranties, and no more. The power of the national government is limited to this guaranty." 92 U. S., 542 (§§ 898-911, *supra*). So in *Virginia v. Rives*, 100 id., 313 (§§ 929-940, *infra*), it was declared by this court, speaking by Mr. Justice Strong, that "these provisions of the fourteenth amendment have reference to state action exclusively, and not to any action of private individuals."

These authorities show conclusively that the legislation under consideration finds no warrant for its enactment in the fourteenth amendment. The language of the amendment does not leave this subject in doubt. When the state

has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the state, as enacted by its legislative, and construed by its judicial, and administered by its executive, departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon congress.

§ 916. *Nothing in the fourteenth amendment warrants section 5519, Revised Statutes.*

Section 5519 of the Revised Statutes is not limited to take effect only in case the state shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property without due process of law, or deny to any person the equal protection of the laws. It applies, no matter how well the state may have performed its duty. Under it private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the state. In the indictment in this case, for instance, which would be a good indictment under the law if the law itself were valid, there is no intimation that the state of Tennessee has passed any law or done any act forbidden by the fourteenth amendment. On the contrary, the *gravamen* of the charge against the accused is that they conspired to deprive certain citizens of the United States and of the state of Tennessee of the equal protection accorded them by the laws of Tennessee. As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the state or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the fourteenth amendment to the constitution.

§ 917. *The thirteenth amendment was intended only to abolish slavery and involuntary servitude.*

We are next to consider whether the thirteenth amendment to the constitution furnishes authority for the enactment of the section. This amendment declares that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." "Congress shall have power to enforce this article by appropriate legislation." It is clear that this amendment, besides abolishing forever slavery and involuntary servitude within the United States, gives power to congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure. Mr. Justice Swaine, in *United States v. Rhodes*, 1 Abb. (U. S.), 28; Mr. Justice Bradley, in *United States v. Cruikshank*, 1 Woods, 308. Congress has, by virtue of this amendment, declared, in section 1 of the act of April 9, 1866, c. 31, that all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to none other.

But the question with which we have to deal is, does the thirteenth amend-

ment warrant the enactment of section 5519 of the Revised Statutes? We are of opinion that it does not. Our conclusion is based on the fact that the provisions of that section are broader than the thirteenth amendment would justify. Under that section it would be an offense for two or more white persons to conspire, etc., for the purpose of depriving another white person of the equal protection of the laws. It would be an offense for two or more colored persons, enfranchised slaves, to conspire with the same purpose against a white citizen or against another colored citizen who had never been a slave. Even if the amendment is held to be directed against the action of private individuals, as well as against the action of the states and United States, the law under consideration covers cases both within and without the provisions of the amendment. It covers any conspiracy between two free white men against another free white man to deprive him of any right accorded him by the laws of the state or of the United States. A law under which two or more free white private citizens could be punished for conspiring or going in disguise for the purpose of depriving another free white citizen of a right accorded by the law of the state to all classes of persons—as, for instance, the right to make a contract, bring a suit, or give evidence—clearly cannot be authorized by the amendment which simply prohibits slavery and involuntary servitude.

Those provisions of the law, which are broader than is warranted by the article of the constitution by which they are supposed to be authorized, cannot be sustained. Upon this question, *United States v. Reese*, 92 U. S., 214 (§§ 1568–86, *infra*), is in point. In that case this court had under consideration the constitutionality of the third and fourth sections of the act of May 31, 1870, c. 114, now constituting sections 2007, 2008 and 5506 of the Revised Statutes. The third section of the act made it an offense for any judge, inspector, or other officer of election, whose duty it was, under the circumstances therein stated, to receive and count the vote of any citizen, to wrongfully refuse to receive and count the same; and the fourth section made it an offense for any person, by force, bribery, or other unlawful means, to hinder or delay any citizen from voting at any election, or from doing any act required to be done to qualify him to vote.

The indictment in the case charged two inspectors of a municipal election in the state of Kentucky with refusing to receive and count at such election the vote of William Garner, a citizen of the United States, of African descent. It was contended by the defendants that it was not within the constitutional power of congress to pass the section upon which the indictment was based. The attempt was made by the counsel for the United States to sustain the law, as warranted by the fifteenth amendment to the constitution of the United States. - But this court held it not to be appropriate legislation under that amendment. The ground of the decision was that the sections referred to were broad enough not only to punish those who hindered and delayed the enfranchised colored citizen from voting, on account of his race, color or previous condition of servitude, but also those who hindered or delayed the free white citizen. The court, speaking by the chief justice, said: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will, when ascertained, if within the consti-

tutional grant of power. But if congress steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon must, annul its encroachment upon the reserved rights of the states and the people." And the court declared that it could not limit the statute so as to bring it within the constitutional power of congress, and concluded: "We must, therefore, decide that congress has not as yet provided by appropriate legislation for the punishment of the offenses charged in the indictment." This decision is in point, and, applying the principle established by it, it is clear that the legislation now under consideration cannot be sustained by reference to the thirteenth amendment to the constitution.

There is another view which strengthens this conclusion. If congress has constitutional authority under the thirteenth amendment to punish a conspiracy between two persons to do an unlawful act, it can punish the act itself, whether done by one or more persons. A private person cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault or murder. If, therefore, we hold that section 5519 is warranted by the thirteenth amendment, we should, by virtue of that amendment, accord to congress the power to punish every crime by which the right of any person to life, property or reputation is invaded. Thus, under a provision of the constitution which simply abolished slavery and involuntary servitude, we should, with few exceptions, invest congress with power over the whole catalogue of crimes. A construction of the amendment which leads to such a result is clearly unsound.

§ 918. *Article 4, section 2, of the constitution is intended merely to inhibit discriminative legislation by the states.*

There is only one other clause in the constitution of the United States which can, in any degree, be supposed to sustain the section under consideration; namely, the second section of article 4, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." But this section, like the fourteenth amendment, is directed against state action. Its object is to place the citizens of each state upon the same footing with citizens of other states, and inhibit discriminative legislation against them by other states. *Paul v. Virginia*, 8 Wall., 168 (§§ 1052-59, *infra*). Referring to the same provision of the constitution, this court said, in *Slaughter-House Cases*, *ubi supra*, that it "did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction." It was never supposed that the section under consideration conferred on congress the power to enact a law which would punish a private citizen for an invasion of the rights of his fellow-citizen, conferred by the state of which they were both residents, on all its citizens alike.

§ 919. *Section 5519, Revised Statutes, is unconstitutional. (a)*

We have, therefore, been unable to find any constitutional authority for the enactment of section 5519 of the Revised Statutes. The decisions of this court above referred to leave no constitutional ground for the act to stand on. The point in reference to which the judges of the circuit court were divided in opinion must, therefore, be decided against the *constitutionality of the law*.

MR. JUSTICE HARLAN dissented on the question of jurisdiction.

## STRAUDER v. WEST VIRGINIA.

(10 Otto, 303-312. 1879.)

ERROR to the Supreme Court of Appeals of West Virginia.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The plaintiff in error, a colored man, was indicted for murder in the circuit court of Ohio county, in West Virginia, on the 20th of October, 1874, and upon trial was convicted and sentenced. The record was then removed to the supreme court of the state, and there the judgment of the circuit court was affirmed. The present case is a writ of error to that court, and it is now, in substance, averred that at the trial in the state court the defendant (now plaintiff in error) was denied rights to which he was entitled under the constitution and laws of the United States. In the circuit court of the state, before the trial of the indictment was commenced, the defendant presented his petition, verified by his oath, praying for a removal of the cause into the circuit court of the United States, assigning, as ground for the removal, that "by virtue of the laws of the state of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the state; that white men are so eligible, and that by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the state of West Virginia for the security of his person as is enjoyed by white citizens, and that he had less chance of enforcing in the courts of the state his rights on the prosecution, as a citizen of the United States, and that the probabilities of a denial of them to him as such citizen on every trial which might take place on the indictment in the courts of the state were much more enhanced than if he was a white man." This petition was denied by the state court, and the cause was forced to trial.

Motions to quash the *venire*, "because the law under which it was issued was unconstitutional, null and void," and successive motions to challenge the array of the panel, for a new trial, and in arrest of judgment, were then made, all of which were overruled and made by exceptions parts of the record.

The law of the state to which reference was made in the petition for removal and in the several motions was enacted on the 12th of March, 1873 (Acts of 1872-73, p. 102), and it is as follows: "All white male persons who are twenty-one years of age and who are citizens of this state shall be liable to serve as jurors, except as herein provided." The persons excepted are state officials.

(a) The same ruling is made in *Le Grand v. United States*,\* 12 Fed. R., 577. This was an indictment for conspiring to deprive a colored man of the equal protection of the laws, on account of his race and color. It was held that the law was not authorized by either the fourteenth or fifteenth amendments; that those amendments are a protection against acts of the states. (*United States v. Reese*, 92 U. S., 214 (§§ 1588-89, *infra*); *United States v. Cruikshank*, 92 U. S., 542 (§§ 898-911, *supra*), cited.)



In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against his race or color, because of race or color; and second, if he has such a right, and is denied its enjoyment by the state in which he is indicted, may he cause the case to be removed into the circuit court of the United States?

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury. The questions are important, for they demand a construction of the recent amendments of the constitution. If the defendant has a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color, because of their race or color, the right, if not created, is protected, by those amendments, and the legislation of congress under them. The fourteenth amendment ordains that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

§ 920. *The fourteenth amendment has the purpose of securing to the colored race the civil rights of the white race.*

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the Slaughter-House Cases, 16 Wall., 36 (§§ 752-801, *infra*), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that state laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some states laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the states where they were resident. It was in view of these considerations the fourteenth amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the proteo-

tion of the general government, in that enjoyment, whenever it should be denied by the states. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws, and authorized congress to enforce its provisions by appropriate legislation. To quote the language used by us in the Slaughter-House Cases, "No one can fail to be impressed with the one pervading purpose found in all the amendments, lying at the foundation of each, and without which none of them would have been suggested,— we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them." So again: "The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied, and by it [the fourteenth amendment] such laws were forbidden. If, however, the states did not conform their laws to its requirements, then, by the fifth section of the article of amendment, congress was authorized to enforce it by suitable legislation." And it was added, "We doubt very much whether any action of a state, not directed by way of discrimination against the negroes, as a class, will ever be held to come within the purview of this provision."

§ 921. *The fourteenth amendment is to be construed liberally, to carry out the purposes of its framers.*

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the state in which they reside). It ordains that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,— the right to exemption from unfriendly legislation against them distinctively as colored,— exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

§ 922. *The confinement of the selection of juries to the white race is a denial to colored men of "equal protection of the laws."*

That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those states where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of jus-

tice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

§ 923. *The right of trial by jury in West Virginia.*

The right to a trial by jury is guarantied to every citizen of West Virginia by the constitution of that state, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal *status* in society as that which he holds. Blackstone, in his Commentaries, says, "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter." It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called "packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the states in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no state shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the states to extend equality of protection.

§ 924. *The jury law of West Virginia discriminates against the colored man, and is void as in conflict with the fourteenth amendment.*

In view of these considerations, it is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offense against the state. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which

the state has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

§ 925. *A state may, in prescribing the qualifications of jurors, make discriminations, but not against race or color.*

We do not say that within the limits from which it is not excluded by the amendment a state may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the fourteenth amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. To quote further from 16 Wall., *supra*: "In giving construction to any of these articles [amendments], it is necessary to keep the main purpose steadily in view." "It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." We are not now called upon to affirm or deny that it had other purposes.

§ 926. *The fourteenth amendment is prohibitory, but its prohibitions imply rights and immunities.*

The fourteenth amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property. Any state action that denies this immunity to a colored man is in conflict with the constitution. Concluding, therefore, that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offense against the state, it remains only to be considered whether the power of congress to enforce the provisions of the fourteenth amendment by appropriate legislation is sufficient to justify the enactment of section 641 of the Revised Statutes.

§ 927. *What rights and immunities may be protected.*

A right or an immunity, whether created by the constitution or only guaranteed by it, even without any express delegation of power, may be protected by congress. *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 539. So in *United States v. Ræse*, 92 U. S., 214 (§§ 1568-86, *infra*), it was said by the chief justice of this court: "Rights and immunities created by or dependent upon the constitution of the United States can be protected by congress. The form and manner of the protection may be such as congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected." But there is express authority to protect the rights and immunities referred to in the fourteenth amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection, and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a state court, in which the right is denied by the state law, into a federal court, where it will be upheld.

This is an ordinary mode of protecting rights and immunities conferred by the federal constitution and laws. Section 641 is such a provision. It enacts that "when any civil suit or criminal prosecution is commenced in any state court for any cause whatsoever against any person who is denied, or cannot enforce in the judicial tribunals of the state, or in the part of the state where such prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial, or final hearing of the case, stating the facts, and verified by oath, be removed before trial into the next circuit court of the United States to be held in the district where it is pending."

§ 928. *In cases in which there is an infringement of the fourteenth amendment, the cause may be removed to the federal from the state courts.*

This act plainly has reference to sections 1977 and 1978 of the statutes which partially enumerate the rights and immunities intended to be guarantied by the constitution, the first of which declares that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other." This act puts in the form of a statute what had been substantially ordained by the constitutional amendment. It was a step towards enforcing the constitutional provisions. Section 641 was an advanced step, fully warranted, we think, by the fifth section of the fourteenth amendment.

We have heretofore considered and affirmed the constitutional power of congress to authorize the removal from state courts into the circuit courts of the United States, before trial, of criminal prosecutions for alleged offenses against the laws of the state, when the defense presents a federal question, or when a right under the federal constitution or laws is involved. *Tennessee v. Davis*, 10 Otto, 257 (§§ 2473-2500, *infra*). It is unnecessary now to repeat what we there said. That the petition of the plaintiff in error, filed by him in the state court before the trial of his case, made a case for removal into the federal circuit court, under section 641, is very plain, if, by the constitutional amendment and section 1977 of the Revised Statutes, he was entitled to immunity from discrimination against him in the selection of jurors, because of their color, as we have endeavored to show that he was. It set forth sufficient facts to exhibit a denial of that immunity, and a denial by the statute law of the state. There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in overruling his challenge to the array of the jury, and in refusing to quash the panel.

The judgment of the supreme court of West Virginia will be reversed, and the case remitted with instructions to reverse the judgment of the circuit court of Ohio county; and it is so ordered.

JUSTICES FIELD and CLIFFORD dissented, on the grounds stated in the dissenting opinion in *Ex parte Virginia*, §§ 941-962, *infra*.

## VIRGINIA v. RIVES.

(10 Otto, 313-339. 1879.)

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The questions presented in this case arise out of the following facts: Burwell Reynolds and Lee Reynolds, two colored men, were jointly indicted for murder in the county court of Patrick county, Virginia, at its January term, 1878. The case having been removed into the circuit court of the state and brought on for trial, the defendants moved the court that the *venire*, which was composed entirely of the white race, be modified so as to allow one-third thereof to be composed of colored men. This motion was overruled on the ground that the court "had no authority to change the *venire*, it appearing (as the record stated) to the satisfaction of the court that the *venire* had been regularly drawn from the jury-box according to law." Thereupon the defendants, before the trial, filed their petition, duly verified, praying for a removal of the case into the circuit court of the United States for the western district of Virginia. This petition represented that the petitioners were negroes, aged respectively seventeen and nineteen years, and that the man whom they were charged with having murdered was a white man. It further alleged that the right secured to the petitioners by the law providing for the equal civil rights of all the citizens of the United States was denied to them in the judicial tribunals of the county of Patrick, of which county they are natives and citizens; that, by the laws of Virginia, all male citizens twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the constitution and laws of the state, are made liable to serve as jurors; that this law allows the right, as well as requires the duty, of the race to which the petitioners belong to serve as jurors; yet that the grand jury who found the indictment against them, as well as the jurors summoned to try them, were composed entirely of the white race. The petitioners further represented that they had applied to the judge of the court, to the prosecuting attorney, and to his assistant counsel, that a portion of the jury by which they were to be tried should be composed in part of competent jurors of their own race and color, but that this right had been refused them. The petition further alleged that a strong prejudice existed in the community of the county against them, independent of the merits of the case, and based solely upon the fact that they are negroes, and that the man they were accused of having murdered was a white man. From that fact alone they were satisfied they could not obtain an impartial trial before a jury exclusively composed of the white race. The petitioners further represented that their race had never been allowed the right to serve as jurors, either in civil or criminal cases, in the county of Patrick in any case, civil or criminal, in which their race had been in any way interested. They therefore prayed that the prosecution might be removed into the circuit court of the United States. The state court denied this prayer, and proceeded with the trial, when each of the defendants was convicted. The verdicts and judgments were, however, set aside, and a motion for a removal of the case was renewed on the same petition, and again denied. The defendants were then tried again separately. One was convicted and sentenced, and a bill of exceptions was duly signed and made part of the record. In the other case the jury disagreed.

In this stage of the proceedings a copy of the record was obtained, the cases were, upon petition, ordered to be docketed in the circuit court of the United

States, November 18, 1878, which was at its next succeeding term after the first application for removal, and a writ of *habeas corpus cum causa* was issued, by virtue of which the defendants were taken from the jail of Patrick county into the custody of the United States marshal, and they are now held in jail subject to the control of that court. No motion has been made in the circuit court to remand the prosecutions to the state court, but the commonwealth of Virginia has applied to this court for a rule to show cause why a *mandamus* should not issue commanding the judge of the district court of the western district of Virginia, the Hon. Alexander Rives, to cause to be redelivered by the marshal of said district to the jailer of Patrick county the bodies of the said Lee and Burwell Reynolds, to be dealt with according to the laws of the said commonwealth. The rule has been granted, and Judge Rives has returned an answer setting forth substantially the facts hereinbefore stated, and averring that the indictments were removed into the circuit court of the United States by virtue of section 641 of the Revised Statutes.

§ 929. *Effect of petition to remove cause to federal court.*

If the petition filed in the state court before trial, and duly verified by the oath of the defendants, exhibited a sufficient ground for a removal of the prosecutions into the circuit court of the United States, they were in legal effect thus removed, and the writ of *habeas corpus* was properly issued. All proceedings in the state court subsequent to the removals were *coram non judice* and absolutely void. This, by virtue of the express declaration of section 641 of the Revised Statutes, which enacts that, "upon the filing of such petition, all further proceedings in the state court shall cease, and shall not be resumed except as hereinafter provided." In *Gordon v. Longest*, 16 Pet., 97, it was ruled by this court that when an application to remove a cause (removable) is made in proper form, and no objection is made to the facts upon which it is founded, "it is the duty of the state court to 'proceed no further in the cause,' and every step subsequently taken in the exercise of jurisdiction in the case, whether in the same court or in the court of appeals, is *coram non judice*." To the same effect is *Insurance Co. v. Dunn*, 19 Wall., 214.

§ 930. *Removal of causes arising under laws made to enforce the fourteenth amendment.*

It is, therefore, a material inquiry whether the petition of the defendants set forth such facts as made a case for removal, and consequently arrested the jurisdiction of the state court, and transferred it to the federal court. Section 641 of the Revised Statutes provides for a removal "when any civil suit or prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied, or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States," etc. It declares that such a case may be removed before trial or final hearing. Was the case of Lee and Burwell Reynolds such a one? Before examining their petition for removal, it is necessary to understand clearly the scope and meaning of this act of congress. It rests upon the fourteenth amendment of the constitution and the legislation to enforce its provisions. That amendment declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. It was in pursuance of these constitutional pro-

visions that the civil rights statutes were enacted. Secs. 1977, 1978, R. S. They enact that all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. Section 1978 enacts that all citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property. The plain object of these statutes, as of the constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races, exactly the same.

§ 931. *The fourteenth amendment refers to state action, not to that of individuals.*

The provisions of the fourteenth amendment of the constitution we have quoted all have reference to state action exclusively, and not to any action of private individuals. It is the state which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against state infringement of those rights. Section 641 was also intended for their protection against state action, and against that alone. It is doubtless true that a state may act through different agencies,—either by its legislative, its executive or its judicial authorities; and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the fourteenth amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive or the judicial department of the state. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a state court in which it is denied, into a federal court where it will be acknowledged. Of this there can be no reasonable doubt.

§ 932. *Laws for removal of causes are constitutional. A cause cannot be removed after trial commenced.*

Removal of cases from state courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the government. Its constitutionality has never been seriously doubted. But it is still a question whether the remedy of removal of cases from state courts into the courts of the United States, given by section 641, applies to all cases in which equal protection of the laws may be denied to a defendant. And clearly it does not. The constitutional amendment is broader than the provisions of that section. The statute authorizes a removal of the case only before trial, not after a trial has commenced. It does not, therefore, embrace many cases in which a colored man's right may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial, or by discrimination against him in the sentence, or in the mode of executing the sentence. But the violation of the constitutional provisions, when made by the judicial tribunals of a state, may be, and generally will be, after the trial has commenced. It is then, during or after the trial, that denials of a defendant's



right by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied, or that he cannot enforce it, in the judicial tribunals.

§ 933. *The remedy for a denial of rights during a trial is not removal under section 641 of the Revised Statutes.*

It is obvious, therefore, that to such a case—that is, a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced—section 641 has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the state, and ultimately to the review of this court. We do not say that congress could not have authorized the removal of such a case into the federal courts at any stage of its proceeding, whenever a ruling should be made in it denying the equal protection of the laws to the defendant. Upon that subject it is unnecessary to affirm anything. It is sufficient to say now that section 641 does not. It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a state, rights secured to a defendant by any law providing for the equal civil rights of all persons, citizens of the United States, of which section 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the state, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. Many such cases of denial might have been apprehended, and some existed. Colored men might have been, as they had been, denied a trial by jury. They might have been excluded by law from any jury summoned to try persons of their race, or the law might have denied to them the testimony of colored men in their favor, or process for summoning witnesses. Numerous other illustrations might be given. In all such cases a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case. By the express requirement of the statute his petition must set forth the facts upon which he bases his claim to have his case removed, and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial.

§ 934. — *but where the law does not deny the right, the discrimination being by the state court in the course of the trial, the remedy is in the revisory power of the federal courts.*

The petition of the two colored men for the removal of their case into the federal court does not appear to have made any case for removal, if we are correct in our reading of the act of congress. It did not assert, nor is it claimed now, that the constitution or laws of Virginia denied to them any civil right, or stood in the way of their enforcing the equal protection of the laws. The law made no discrimination against them because of their color, nor any discrimination at all. The complaint is that there were no colored men in the jury that indicted them, nor in the petit jury summoned to try them. The peti-

tion expressly admitted that by the laws of the state all male citizens twenty-one years of age and not over sixty, who are entitled to vote and hold office under the constitution and laws thereof, are made liable to serve as jurors. And it affirms (what is undoubtedly true) that this law allows the right, as well as requires the duty, of the race to which the petitioners belong to serve as jurors. It does not exclude colored citizens.

Now, conceding as we do, and as we endeavored to maintain in the case of *Strauder v. West Virginia*, 10 Otto, 303 (§§ 920-928, *supra*), that discrimination by law against the colored race, because of their color, in the selection of jurors, is a denial of the equal protection of the laws to a negro when he is put upon trial for an alleged criminal offense against a state, the laws of Virginia make no such discrimination. If, as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the statute of the state, confined his selection to white persons, and refused to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the state's laws, as well as of the act of congress of March 1, 1875, which prohibits and punishes such discrimination. He made himself liable to punishment at the instance of the state and under the laws of the United States. In one sense, indeed, his act was the act of the state, and was prohibited by the constitutional amendment. But inasmuch as it was a criminal misuse of the state law, it cannot be said to have been such a "denial or disability to enforce in the judicial tribunals of the state" the rights of colored men, as is contemplated by the removal act. Section 641. It is to be observed that act gives the right of removal only to a person "who is denied, or cannot enforce, in the judicial tribunals of the state his equal civil rights." And this is to appear before trial. When a statute of the state denies his right or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of section 641. But when a subordinate officer of the state, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, "in the judicial tribunals of the state" the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a *venire* is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason,—it can with no propriety be said the defendant's right is denied by the state and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of section 641. Denials of equal rights in the action of the judicial tribunals of the state are left to the revisory powers of this court. The assertions in the petition for removal, that the

grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white race, and that their race had never been allowed to serve as jurors in the county of Patrick in any case in which a colored man was interested, fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected.

§ 935. *A colored person has no right to be tried by a mixed jury.*

Nor did the refusal of the court and of the counsel for the prosecution to allow a modification of the *venire*, by which one-third of the jury, or a portion of it, should be composed of persons of the petitioners' own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them, or to any person, by the law of the state, or by any act of congress, or by the fourteenth amendment of the constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the state court, viz., a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any federal statute. It is not, therefore, guarantied by the fourteenth amendment, or within the purview of section 641. It follows that the petition for a removal stated no facts that brought the case within the provisions of this section, and, consequently, no jurisdiction of the case was acquired by the circuit court of the United States. In the absence of such jurisdiction the writ of *habeas corpus*, by which the petitioners were taken from the custody of the state authorities, should not have been issued. The circuit court has now no authority to hold them, and they should be remanded.

§ 936. *Mandamus is a proper writ to issue from this court to the district court to cause a return of prisoners to the custody of the state.*

Upon the question whether a writ of *mandamus* is a proper proceeding to enforce the return of the men indicted to the custody of the state authorities, little need be said in view of former decisions of this court. Section 688 of the Revised Statutes enacts that the supreme court shall have power to issue . . . writs of *mandamus* in cases warranted by the principles and usages of law to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a state or an ambassador, or other public minister, or a consul or vice-consul, is a party. In what case such a writ is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do. It does not lie to control judicial discretion except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within

their lawful bounds. Bacon's Abridgment, Mandamus, Letter D; Tapping on Mandamus, 105; 3 Bl. Com., 110. This subject was discussed at length in *Ex parte Bradley*, 7 Wall., 364, and what was there said renders unnecessary any discussion of it now. To that discussion we refer. In our judgment it vindicates the use of a writ of *mandamus* in such a case as the present. The writ will, therefore, be awarded, and it is so ordered.

MR. JUSTICE FIELD rendered a separate opinion, in which MR. JUSTICE CLIFFORD concurred. After considering the question as to the power to issue the writ of *mandamus*, he proceeded as follows:

The preliminary objections to the exercise of our jurisdiction being disposed of, we are brought to the important inquiry whether the action of the circuit court, in taking the prisoners from the custody of the authorities of Virginia, was authorized under the laws of the United States. The *mandamus* prayed is to compel the return of the prisoners, as already stated; but the validity of the order directing the marshal to take them into his custody depends upon the legality of the removal of the prosecution from the state to the federal court. The order to the marshal was the necessary sequence of assuming jurisdiction of the prosecution. The legality of the removal is, therefore, the question for determination. Its legality is denied by Virginia on two grounds: 1st, that the act of congress (R. S., sec. 641), upon the provisions of which the respondent relies, does not authorize the removal; and 2d, that the act, in authorizing a criminal prosecution for an offense against a law of the state to be, before trial, removed from a state court to a federal court, is unconstitutional and void. In my opinion both of these grounds are well taken.

Section 641 of the Revised Statutes, re-enacting provisions of previous statutes, in terms provides in certain cases for the removal to the circuit courts of the United States of criminal prosecutions commenced in a state court. It declares that "when any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied, or cannot enforce in the judicial tribunals of the state, or in any part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespass, or wrongs made or committed by virtue of, or under color of authority derived from, any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant filed in said state court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state courts shall cease." The section also provides for furnishing the circuit court with copies of the process, pleadings and proceeding of the state court. A subsequent section provides for the issue in such cases of a writ of *habeas corpus cum causa* to remove the accused, when in actual custody upon process of the state court, to the custody of the marshal of the United States.

§ 937. *What is necessary to obtain a removal of a cause from a state to a federal court under section 641, Revised Statutes.*

By this enactment it appears that, in order to obtain a removal of a prosecu-

tion from a state to a federal court,—except where it is against a public officer or other person for certain trespasses or conduct not material to consider in this connection,—the petition of the accused must show a denial of, or an inability to enforce in the tribunals of the state, or of that part of the state where the prosecution is pending, some right secured to him by the law providing for the equal rights of citizens or persons within the jurisdiction of the United States. But how must the denial of a right under such a law, or the accused's inability to enforce it in the judicial tribunals of the state, be made to appear? So far as the accused is concerned, the law requires him to state and verify the facts, and from them the court will determine whether such denial or inability exists. His naked averment of such denial or inability can hardly be deemed sufficient; if it were so, few prosecutions would be retained in a state court for insufficient allegations when the accused imagined he would gain by the removal. *State of Texas v. Gaines*, 2 Woods, 344. There must be such a presentation of facts as to lead the court to the conclusion that the averments of the accused are well founded. There are many ways in which a person may be denied his rights or be unable to enforce them in the tribunals of a state. The denial or inability may arise from direct legislation, depriving him of their enjoyment or the means of their enforcement, or discriminating against him or the class, sect or race to which he belongs. And it may arise from popular prejudices, passions or excitement, biasing the minds of jurors and judges. Religious animosities, political controversies, antagonisms of race, and a multitude of other causes will always operate, in a greater or less degree, as impediments to the full enjoyment and enforcement of civil rights. We cannot think that the act of congress contemplated a denial of, or an inability to enforce, one's rights from these latter and similar causes, and intended to authorize a removal of a prosecution by reason of them from a state to a federal court. Some of these causes have always existed in some localities in every state, and the remedy for them has been found in a change of the place of trial to other localities where like impediments to impartial action of the tribunals did not exist. The Civil Rights Act, to which reference is made in the section in question, was only intended to secure to the colored race the same rights and privileges as are enjoyed by white persons: it was not designed to relieve them from those obstacles in the enjoyment of their rights to which all other persons are subject, and which grow out of popular prejudices and passions.

§ 938. *The provision against denial of rights has reference to legislative action by the state.*

The denial of rights, or the inability to enforce them, to which the section refers, is, in my opinion, such as arises from legislative action of the state, as, for example, an act excluding colored persons from being witnesses, making contracts, acquiring property, and the like. With respect to obstacles to the enjoyment of rights arising from other causes, persons of the colored race must take their chances of removing or providing against them with the rest of the community. This conclusion is strengthened by the provisions of the fourteenth amendment to the constitution. The original Civil Rights Act was passed, it is true, before the adoption of that amendment; but great doubt was expressed as to its validity, and to obtain authority for similar legislation, and thus obviate the objections which had been raised to its first section, was one of the objects of the amendment. After its adoption the Civil Rights Act was re-enacted, and upon the first section of that amendment it rests. That sec-

tion is directed against the state. Its language is that "*no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*" As the state, in the administration of its government, acts through its executive, legislative and judicial departments, the inhibition applies to them. But the executive and judicial departments only construe and enforce the laws of the state; the inhibition, therefore, is in effect against passing and enforcing any laws which are designed to accomplish the ends forbidden. If an executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts, the state is not responsible for them. The action of the judicial officer in such a case, where the rights of a citizen under the laws of the United States are disregarded, may be reviewed and corrected or reversed by this court: it cannot be imputed to the state, so as to make it evidence that she, in her sovereign or legislative capacity, denies the rights invaded, or refuses to allow their enforcement. It is merely the ordinary case of an erroneous ruling of an inferior tribunal. Nor can the unauthorized action of an executive officer, impinging upon the rights of the citizen, be taken as evidence of her intention or policy so as to charge upon her a denial of such rights.

If these views are correct, no cause is shown in the petition of the prisoners that justified a removal of the prosecutions against them to the federal court. No law of Virginia makes any discrimination against persons of the colored race, or excludes them from the jury. The law respecting jurors provides that "all male citizens, twenty-one years of age and not over sixty, who are entitled to vote and hold office under the constitution and laws of the state," with certain exemptions not material to the question presented, may be jurors; and it authorizes an annual selection in each county, by the county judge, from the citizens at large, of from one to three hundred persons, whose names are to be placed in a box, and from them the jurors, grand and petit, of the county are to be drawn. There is no restriction placed upon the county judge in selecting them, except that they shall be such as he shall think "well qualified to serve as jurors, being persons of sound judgment and free from legal exception." The mode thus provided, properly carried out, cannot fail to secure competent jurors. Certain it is that no rights of the prisoners are denied by this legislation. The application to the state court, upon the refusal of which the petition was presented, was for a *venire* composed of one-third of their race,—a proceeding wholly inadmissible in any jury system which obtains in the several states.

§ 939. *It is not necessary, to secure "equal protection of the laws" for colored defendants, that colored persons should sit on the juries which try them.*

From the return of the district judge it would seem that in his judgment the presence of persons of the colored race on the jury is essential to secure to them the "equal protection of the laws;" but how this conclusion is reached is not apparent, except upon the general theory that such protection can only be afforded to parties when persons of the class to which they belong are allowed to sit on their juries. The correctness of this theory is contradicted by every day's experience. Women are not allowed to sit on juries; are they thereby denied the equal protection of the laws? Foreigners resident in the country are not permitted to act as jurors, yet they are protected in their rights equally with citizens. Persons over sixty years of age in Virginia are

disqualified as jurors, yet no one will pretend that they do not enjoy the equal protection of the laws. If, when a colored person is indicted for a criminal offense, it is essential, to secure to him the equal protection of the laws, that persons of his race should be on the jury by which he is tried, it would seem that the presence of such persons on the bench should be equally essential where the court consists of more than one judge; and that if it should consist of only a single judge, such protection would be impossible. To such an absurd result does the doctrine lead, which the circuit court announced as controlling its action.

The equality of protection assured by the fourteenth amendment to all persons in the state does not imply that they shall be allowed to participate in the administration of its laws, or to hold any of its offices, or to discharge any duties of a public trust. The universality of the protection intended excludes any such inference. Were this not so, aliens resident in the country, or temporarily here, of whom there are many thousands in each state, would be without that equal protection which the amendment declares that no state shall deny to any person within its jurisdiction. It follows from these views as to the meaning and purpose of the act of congress, that the removal of the prosecution in this case from the state to the federal court is unauthorized by it; and that the order of the circuit court to the marshal to take the prisoners from the custody of the state authorities is illegal and void.

§ 940. *Congress has no power to authorize federal courts to try offenses against the states.*

The second objection of the commonwealth to the legality of the removal is equally conclusive. The prosecution is for the crime of murder, committed within her limits, by persons and at a place subject to her jurisdiction. The offense charged is against her authority and laws, and she alone has the right to inquire into its commission, and to punish the offender. Murder is not an offense against the United States, except when committed on an American vessel on the high seas, or in some port or haven without the jurisdiction of the state, or in the District of Columbia, or in the territories, or at other places where the national government has exclusive jurisdiction. The offense within the limits of a state, except where jurisdiction has been ceded to the United States, is as much beyond the jurisdiction of these courts as though it had been committed on another continent. The prosecution of the offense in such a case does not, therefore, arise under the constitution and laws of the United States; and the act of congress which attempts to give the federal courts jurisdiction of it is, to my mind, a clear infraction of the constitution. That instrument defines and limits the judicial power of the United States.

It declares, among other things, that the judicial power shall extend to cases in law and equity arising under the constitution, laws and treaties of the United States, and to various controversies to which a state is a party; but it does not include in its enumeration controversies between a state and its own citizens. There can be no ground, therefore, for the assumption by a federal court of jurisdiction of offenses against the laws of a state. The judicial power granted by the constitution does not cover any such case or controversy. And whilst it is well settled that the exercise of the power granted may be extended to new cases as they arise under the constitution and laws, the power itself cannot be enlarged by congress. The constitution creating a government of limited powers puts a bound upon those which are judicial as well as those which are legislative, which cannot be lawfully passed. This view would seem

to be conclusive against the validity of the attempted removal of the prosecution in this case from the state court. The federal court could not, in the first instance, have taken jurisdiction of the offense charged, and summoned a grand jury to present an indictment against the accused; and if it could not have taken jurisdiction at first, it cannot do so upon a removal of the prosecution to it. The jurisdiction exercised upon the removal is original and not appellate, as is sometimes erroneously asserted; for, as stated by Chief Justice Marshall in *Marbury v. Madison*, already cited [1 Cranch, 137], it is of the essence of appellate jurisdiction that it revises and corrects proceedings already had. The removal is only an indirect mode by which the federal court acquires original jurisdiction. *Railway Co. v. Whitton*, 13 Wall., 270.

The constitution, it is to be observed, in the distribution of the judicial power, declares that in the cases enumerated in which a state is a party, the supreme court shall have original jurisdiction. Its framers seemed to have entertained great respect for the dignity of a state, which was to remain sovereign, at least in its reserved powers, notwithstanding the new government, and therefore provided that when a state should have occasion to seek the aid of the judicial power of the new government, or should be brought under its subjection, that power should be invoked only in its highest tribunal. It is difficult to believe that the wise men who sat in the convention which framed the constitution and advocated its adoption ever contemplated the possibility of a state being required to assert its authority over offenders against its laws in other tribunals than those of its own creation, and least of all in an inferior tribunal of the new government. I do not think I am going too far in asserting that had it been supposed a power so dangerous to the independence of the states, and so calculated to humiliate and degrade them, lurked in any of the provisions of the constitution, that instrument would never have been adopted.

There are many other difficulties in maintaining the position of the circuit court, which the counsel of the accused and the attorney-general have earnestly defended. If a criminal prosecution of an offender against the laws of a state can be transferred to a federal court, what officer is to prosecute the case? Is the attorney of the commonwealth to follow the case from his county, or will the United States district attorney take charge of it? Who is to summon the witnesses and provide for their fees? In whose name is judgment to be pronounced? If the accused is convicted and ordered to be imprisoned, who is to enforce the sentence? If he is deemed worthy of executive clemency, who is to exercise it — the governor of the state, or the president of the United States? Can the president pardon for an offense against the state? Can the governor release from the judgment of a federal court? These and other questions which might be asked show, as justly observed by the counsel of Virginia, the incongruity and absurdity of the attempted proceeding.

Undoubtedly, if in the progress of a criminal prosecution, as well as in the progress of a civil action, a question arise as to any matter under the constitution and laws of the United States, upon which the defendant may claim protection, or any benefit in the case, the decision thereon may be reviewed by the federal judiciary, which can examine the case so far, and so far only, as to determine the correctness of the ruling. If the decision be erroneous in that respect, it may be reversed and a new trial had. Provision for such revision was made in the twenty-fifth section of the judiciary act of 1789, and is retained in the Revised Statutes. That great act was penned by Oliver Ellsworth, a member of the convention which framed the constitution, and one of the early chief



justices of this court. It may be said to reflect the views of the founders of the republic as to the proper relations between the federal and state courts. It gives to the federal courts the ultimate decision of federal questions, without infringing upon the dignity and independence of the state courts. By it harmony between them is secured, the rights of both federal and state governments maintained, and every privilege and immunity which the accused could assert under either can be enforced.

## EX PARTE VIRGINIA.

(10 Otto, 389-370. 1879.)

## Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The petitioner, J. D. Coles, was arrested, and he is now held in custody under an indictment found against him in the district court of the United States for the western district of Virginia. The indictment alleged that he, being a judge of the county court of Pittsylvania county of that state, and an officer charged by law with the selection of jurors to serve in the circuit and county courts of said county in the year 1878, did then and there exclude and fail to select as grand and petit jurors certain citizens of said county of Pittsylvania, of African race and black color, said citizens possessing all other qualifications prescribed by law, and being by him excluded from the jury lists made out by him as such judge, on account of their race, color and previous condition of servitude, and for no other reason, against the peace and dignity of the United States, and against the form of the statute of the United States in such case made and provided.

Being thus in custody, he has presented to us his petition for a writ of *habeas corpus* and a writ of *certiorari* to bring up the record of the district court, in order that he may be discharged; and he avers that the district court had and has no jurisdiction of the matters charged against him in said indictment; that they constitute no offense punishable in said district court; and that the finding of said indictment, and his consequent arrest and imprisonment, are unwarranted by the constitution of the United States, or by any law made in pursuance thereof, and are in violation of his rights and of the rights of the state of Virginia, whose judicial officer he is. A similar petition has been presented by the state of Virginia, praying for a *habeas corpus* and for the discharge of the said Coles. Accompanying both these petitions are exhibited copies of the indictment, the bench-warrant, and the return of the marshal, showing the arrest of the said Coles and his detention in custody.

§ 941. *Under what circumstances this court can issue a writ of habeas corpus.*

Both these petitions have been considered as one case, and the first question they present is, whether this court has jurisdiction to award the writ asked for by the petitioners. The question is not free from difficulty, in view of the constitution, and the several acts of congress relating to writs of *habeas corpus*, and in view of our decisions heretofore made. If granting the writ would be an exercise of original jurisdiction, it would seem that it could not be granted, unless the fact that one of the petitioners for the writ is the state of Virginia makes the cases to differ. This is established by the rulings in *Marbury v. Madison*, 1 Cranch, 137, and in numerous subsequent decisions. And it is not readily perceived how the fact that a state applies for the writ to be directed to one of her own citizens can make a case for our original jurisdiction. But the appellate power of this court is broader than its original, and generally —

that is, in most cases — it may be said that the issue of a writ of *habeas corpus* by us, when it is directed to one of our inferior courts, is an exercise of our appellate jurisdiction. Without going at large into a discussion of its extent, it is sufficient for the present to notice the fact that the exercise of the appellate power is not limited by the constitution to any particular form or mode. It is not alone by appeal or by writ of error that it may be invoked. In the *Matter of Metzger*, 5 How., 176, it was indeed ruled that an order of commitment made by a district judge, *at chambers*, cannot be revised here by *habeas corpus*. But such an order was reviewable in no form; and, besides, the authority of that case has been much shaken. *In re Kaine*, 14 How., 103; *Ex parte Yenger*, 8 Wall., 85. In the latter of these cases, it was said by Chief Justice Chase, in delivering the opinion of the court: "We regard as established, upon principle and authority, that the appellate jurisdiction by *habeas corpus* extends to all cases of commitment by the judicial authority of the United States, not within any exception made by congress."

In the present case, the petitioner Coles is in custody under a bench-warrant directed by the district court, and the averment is that the court had no jurisdiction of the indictment on which the warrant is founded. The district court is an inferior court, and, in such a case as that exhibited by the indictment, its judgments are reviewable here. The indictment has been found for a violation of section 4 of the act of congress of March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights." 18 Stat., part 3, 336. The third section gives to the district courts as well as the circuit judicial cognizance of all offenses against the provisions of the act; and the fifth section enacts that all cases arising under the provisions of the act shall be reviewable by the supreme court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other cases in said court. If this section applies to criminal cases as well as civil, our appellate power extends directly to the district court, and the act of March 3, 1879 (20 Stat., 354), which allows writs of error to the circuit court in such cases, has not deprived us of appellate jurisdiction.

We have, then, an application to our appellate power over the action of a district court, in a case where it is alleged that court has acted outside of its jurisdiction. It is said there is nothing to appeal from; that no decision or judgment has been given in the inferior court, and that the appeal, if any, is taken from the finding of a grand jury. This is a mistake. The bench-warrant was an order of the court, and the validity of the bench-warrant is the matter in question. It is true there has been no final judgment or decision of the whole case; but an appeal may lie, and in many courts often does lie, from a merely interlocutory order. It is said no *habeas corpus* was sued out either in the district or circuit court, and that we are not called upon to review the action of a lower court upon such a writ. This is true, and such a writ from the lower court would have been a more regular proceeding. We cannot say, however, it was indispensable, especially in view of the fact that a state is seeking release of one of her officers, and in view of former action in this court. In *United States v. Hamilton*, 3 Dall., 17, this court awarded a writ of *habeas corpus* to review a commitment under a warrant of a district judge. In *Ex parte Burford*, 3 Cranch, 448, such a writ was awarded to review a commitment by the circuit court of the District of Columbia, not to review a decision of an inferior court upon a *habeas corpus* issued by it. So, in *Ex parte Jackson*, 96

U. S., 727, in which the question of our power to issue the writ was raised, and the petition only averred that the circuit court had exceeded its jurisdiction, this court considered the merits of the case, without regard to the fact that there had been no *habeas corpus* in the court below. And in *Ex parte Lange*, 18 Wall., 163, it was ruled, after an examination of authorities, that when a prisoner shows that he is held under a judgment of a federal court, given without authority of law, this court, by writs of *habeas corpus* and *certiorari*, will look into the record, so far as to ascertain whether that is the fact, and, if it is found to be so, will discharge him. Mr. Justice Miller said, in delivering the opinion: "The authority of the court in such a case, under the constitution of the United States, and the fourteenth section of the judiciary act of 1789, to issue this writ and to examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer an open question."

§ 942. — *may issue to an inferior federal court when a prisoner is held without lawful authority.*

While, therefore, it is true that a writ of *habeas corpus* cannot generally be made to subserve the purposes of a writ of error, yet when a prisoner is held without any lawful authority, and by an order beyond the jurisdiction of an inferior federal court to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all. Our conclusion, then, is that we are empowered to grant the writ in such a case as is presented in these petitions. We come now to the merits of the case.

The indictment and bench-warrant, in virtue of which the petitioner Coles has been arrested and is held in custody, have their justification,—if any they have,—in the act of congress of March 1, 1875, section 4. 18 Stat., part 3, 336. That section enacts that "no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than \$5,000." The defendant has been indicted for the misdemeanor described in this act, and it is not denied that he is now properly held in custody to answer the indictment, if the act of congress was warranted by the constitution. The whole merits of the case are involved in the question whether the act was thus warranted. The provisions of the constitution that relate to this subject are found in the thirteenth and fourteenth amendments. The thirteenth ordains that "neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction," and it declares that congress shall have power to enforce the article by appropriate legislation. This has been followed by the fourteenth amendment, which ordains that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws." This amendment also declares that

"the congress shall have power to enforce by appropriate legislation the provisions of this article."

§ 943. *The main purpose of the thirteenth and fourteenth amendments.*

One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood into perfect equality of civil rights with all other persons within the jurisdiction of the states. They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the states and enlargements of the power of congress. They are to some extent declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation. We had occasion in the Slaughter-House Cases, 16 Wall., 36 (§§ 752-801, *supra*), to express our opinion of their spirit and purpose, and, to some extent, of their meaning. We have again been called to consider them in *Tennessee v. Davis*, 10 Otto, 257 (§§ 2473-2500, *infra*), and *Strauder v. West Virginia*, 10 Otto, 303 (§§ 920-928, *supra*). In this latter case we held that the fourteenth amendment secures, among other civil rights, to colored men, when charged with criminal offenses against a state, an impartial jury trial by jurors indifferently selected or chosen, without discrimination against such jurors because of their color. We held that immunity from any such discrimination is one of the equal rights of all persons, and that any withholding it by a state is a denial of the equal protection of the laws, within the meaning of the amendment. We held that such an equal right to an impartial jury trial, and such an immunity from unfriendly discrimination, are placed by the amendment under the protection of the general government and guarantied by it. We held, further, that this protection and this guaranty, as the fifth section of the amendment expressly ordains, may be enforced by congress by means of appropriate legislation.

§ 944. *Legislation that is suitable to carry into effect the objects of the fourteenth amendment is proper and legitimate.*

All of the amendments derive much of their force from this latter provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guarantied. It is not said that branch of the government shall be authorized to declare void any action of a state in violation of the prohibitions. It is the power of congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power.

Nor does it make any difference that such legislation is restrictive of what the state might have done before the constitutional amendment was adopted. The prohibitions of the fourteenth amendment are directed to the states, and they are to a degree restrictions of state power. It is these which congress is empowered to enforce, and to enforce against state action, however put forth, whether that action be executive, legislative or judicial. Such enforcement is no invasion of state sovereignty. No law can be, which the people of the states have, by the constitution of the United States, empowered congress to enact.

This extent of the powers of the general government is overlooked, when it is said, as it has been in this case, that the act of March 1, 1875, interferes with state rights. It is said the selection of jurors for her courts and the administration of her laws belong to each state; that they are her rights. This is true in the general. But in exercising her rights a state cannot disregard the limitations which the federal constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the states. It is carved out of them.

§ 945. *The fourteenth amendment was intended to prevent any discrimination by the state in any of its departments.*

We have said the prohibitions of the fourteenth amendment are addressed to the states. They are: "No state shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws." They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it. But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to congress to *enforce* its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a state, but upon the persons who are the agents of the state, in the denial of the rights which were intended to be secured. Such is the act of March 1, 1875, and we think it was fully authorized by the constitution.

§ 946. *The fourteenth amendment authorizes congress to compel obedience to its requirements.*

The argument in support of the petition for a *habeas corpus* ignores entirely the power conferred upon congress by the fourteenth amendment. Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the state, as was said in *Commonwealth of Kentucky v. Dennison*, 24 How., 66. The act under consideration in that case provided no means to compel the execution of the duty required by it, and the constitution gave none. It was of such an act Mr. Chief Justice Taney said, that a power vested in the United States to inflict any punishment for neglect or refusal to perform the duty required by the act of congress "would place every state under the control and dominion of the general government, even in the administration of its internal concerns and re-

served rights." But the constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the fourteenth amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete. The remarks made in *Kentucky v. Dennison* and in *Collector v. Day*, though entirely just as applied to the cases in which they were made, are inapplicable to the case we have now in hand.

§ 947. *The selection of jurors is a ministerial, not a judicial, act.*

We do not perceive how holding an office under a state, and claiming to act for the state, can relieve the holder from obligation to obey the constitution of the United States, or take away the power of congress to punish his disobedience. It was insisted during the argument on behalf of the petitioner that congress cannot punish a state judge for his official acts; and it was assumed that Judge Coles, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times the selection was made by the sheriff. In such cases it surely is not a judicial act in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc. Is their election or their appointment a judicial act?

§ 948. *A state judge can be punished for violating an act of congress under color of performing judicial duties.*

But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the state statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the act of congress is unconstitutional because it inflicts penalties upon state judges for their judicial action. It does no such thing.

Upon the whole, as we are of opinion that the act of congress upon which the indictment against the petitioner was founded is constitutional, and that he is correctly held to answer it, and as, therefore, no object would be secured by issuing a writ of *habeas corpus*, the petitions are denied.

Dissenting opinion by MR. JUSTICE FIELD, MR. JUSTICE CLIFFORD concurring.

I dissent from the judgment of the court in this case, and from the reasons by which it is supported, and I will state the grounds of my dissent.

In Virginia, all male citizens between the ages of twenty-one and sixty, who are entitled to vote and hold office under the constitution and laws of the state, are liable, with certain exceptions not material to be here mentioned, to serve as jurors. The judge of each county or corporation court is required to prepare annually a list of such inhabitants of the county or corporation, not less

than one hundred, nor exceeding three hundred in number, "as he shall think well qualified to serve as jurors, being persons of sound judgment and free from legal exception." The name of each person on the list thus prepared is to be written on a separate ballot, and placed in a box to be kept by the clerk of the court. From this box the names of persons to be summoned as grand and petit jurors of the county are to be drawn. The law, in thus providing for the preparation of the list of persons from whom the jurors are to be taken, makes no discrimination against persons of the colored race. The judge of the county or corporation court is restricted in his action only by the condition that the persons selected shall, in his opinion, be "well qualified to serve as jurors," be "of sound judgment," and "free from legal exception." Whether they possess these qualifications is left to his determination; and, as I shall attempt hereafter to show, for the manner in which he discharges this duty he is responsible only to the state whose officer he is and whose law he is bound to enforce.

The petitioner, J. D. Coles, is the judge of the county court of the county of Pittsylvania, in Virginia, and has held that office for some years. It is not pretended that, in the discharge of his judicial duties, he has ever selected as jurors persons who were not qualified to serve in that character, or who were not of sound judgment, or who were not free from legal exception. It is not even suggested in argument that he has not all times faithfully obeyed the law of the state; yet he has been indicted in the district court of the United States for the western district of Virginia for having on some undesignated day in the year 1878, excluded and failed to select as grand and petit jurors citizens of the county, on account of race, color and previous condition of servitude. The indictment does not state who those citizens were, or set forth any particulars of the offense, but charges it in the general words of a definition. The district court, nevertheless, issued a bench-warrant, upon which the judge was arrested, and, refusing to give bail, he is held in custody to answer the indictment. He therefore petitions for a *certiorari* to that court to send up the record of its proceedings for our examination, and for writ of *habeas corpus*, alleging that its action was without jurisdiction, and that his imprisonment thereunder is unlawful, and he prays to be released therefrom.

The commonwealth of Virginia has also presented a similar petition, declaring that she is injured by being deprived of the services of her judicial officer, by his unlawful arrest and imprisonment. If the district court had no jurisdiction, as alleged, of the matters charged against the county judge, if they constitute no public offense for which he could be held, his arrest and imprisonment upon process issued upon the indictment were unlawful, and his petition should be granted.

§ 949. *Use of the writ of habeas corpus.*

It has been settled by this court upon full examination, and after some conflict of opinion among its members, that the writ of *habeas corpus* is a mode provided for the exercise of its appellate jurisdiction, whenever by any unauthorized action of an inferior tribunal, whether it be by its order, decree or process, a citizen is restrained of his personal liberty, and that a *certiorari* will issue, in connection with the writ, to bring up the record of the inferior tribunal for examination. In such cases this court will look into the record to determine, not whether the inferior tribunal has erred in its action, but whether it has exceeded its jurisdiction in the imprisonment of the petitioner. *Ex parte Yerger*, 8 Wall., 85; *Ex parte Lange*, 18 id., 166. The indictment is founded upon the fourth section of the act of congress of March 1, 1875, "to protect

all citizens in their civil and legal rights," which declares, "That no citizen possessing all other qualifications, which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than \$5,000." In what I have to say, I shall endeavor to show that the district court in issuing its process for the arrest of the defendant, and in imprisoning him, exceeded its jurisdiction: 1st, because, assuming that the act of 1875 is constitutional and valid legislation, the indictment describes no offense under it, but is void on its face; and 2d, because that act in the section cited, so far as it relates to jurors in the state courts, is unconstitutional and void.

§ 950. *Essentials of a valid indictment.*

The indictment merely repeats the general language of the statute. It avers that the defendant, being judge of Pittsylvania county, and an officer charged by law with the selection of jurors to serve in the circuit and county courts of the county, excluded and failed to select as jurors, on account of race, color and previous condition of servitude, certain citizens of the county possessing all other qualifications prescribed by law; but it names no citizens who were thus excluded, and, of course, designates no specific traversable offense. It is essential to a valid indictment that it should set forth the offense, with such particulars of time, place and person, that the accused may know the nature of the charge, and be able to prepare to meet it. It is not enough to repeat the definition of the offense in the general language of the statute, and then aver that the defendant has been guilty of the offense thus defined, without other specification. It is not sufficient, for example, to charge in an indictment that the defendant has been guilty of murder, without stating the time and place of the offense, and the name of the person murdered; or, if his name be unknown, giving such a description as to identify him. An indictment, without such specification would be merely a collection of pointless words. This doctrine is only common learning; it is found in the hornbooks of the law; it is on the pages thumbed by the student in his first lessons in criminal procedure.

The constitution, in its sixth amendment, strikes with nullity all such vague accusations as are embraced in this indictment. It declares, repeating in this respect the doctrine of the common law, that, in all criminal prosecutions, the accused shall "be informed of the nature and cause of the accusation" against him; and this means that all the essential ingredients of the offense charged must be stated, embracing with reasonable certainty the particulars of time, place and person or property. It is only by such information that the accused will be enabled to prepare his defense, and avail himself of his acquittal or conviction against any further prosecution for the same cause. "This principle," says Bishop in his treatise, "that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted, pervades the entire system of the adjudged law of criminal procedure. It is not made apparent to our understandings by a single case only, but by all the cases. Wherever we move in this department of our jurisprudence, we come in contact with it. We can no more escape from it than from the atmosphere which surrounds us." Section 81. To the same effect is the language of Arch-



bold, in his treatise on Criminal Practice and Pleading. "The indictment," he says, "must state all the facts and circumstances comprised in the definition of the offense, by the rule of the common law or statute on which the indictment is founded. And these must be stated with clearness and certainty, otherwise the indictment will be bad." And he states that the principal rule as to the certainty required in an indictment may be laid down thus: "That where the definition of an offense, whether by a rule of the common law or by statute, includes generic terms (as it necessarily must), it is not sufficient that the indictment should charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars. P. 88. This doctrine is fully stated and illustrated in *United States v. Cruikshank*, both in the prevailing and dissenting opinion. 92 U. S., 558 (§§ 898–911, *supra*). Tested by it, the indictment here is but a string of words, presenting no specific offense, and, therefore, not justifying the issue of any process for the arrest and imprisonment of the petitioner.

It is difficult to understand how an indictment so defective could have been drawn by the public prosecutor, unless we accept, as an explanation of it, the extraordinary statement of counsel, that the district judge instructed the grand jury to the effect that, whenever it appeared that a state judge, in discharging the duty imposed on him by the law of the state to prepare annually a list of such inhabitants of his county as he should "think well qualified to serve as jurors, being persons of sound judgment and free from legal exception," had never put colored persons on the jury lists, it was to be presumed that his failure to do so was because of their race, color or previous condition of servitude, and that it was the duty of the grand jury to indict him for that offense. In the face of this ruling no defense could be made by the accused, although he may have exercised at all times his best judgment in the selection of qualified persons, unless he could prove, what in most cases would be impossible, that in a county of many thousand inhabitants there was not a colored person qualified to serve as a juror. With this ruling there could be no necessity of alleging in the indictment anything beyond the general failure to put colored persons on the jury list—a fact which could not be disputed; and it would sufficiently inform the accused that he must be prepared, in order to rebut the presumption of guilt, to prove that there were no persons of the colored race in the county qualified to act as jurors. It is difficult to speak of this ruling in the language of moderation.

My second position is that the fourth section of the act of 1875, so far as it applies to the selection of jurors in the state courts, is unconstitutional and void. Previous to the late amendments, it would not have been contended, by any one familiar with the constitution, that congress was vested with any power to exercise supervision over the conduct of state officers in the discharge of their duties under the laws of the state, and prescribe a punishment for disregarding its directions. It would have been conceded that the selection of jurors was a subject exclusively for regulation by the states; that it was for them to determine who should act as jurors in their courts, from what class they should be taken, and what qualifications they should possess; and that their officers, in carrying out the laws in this respect, were responsible only to them. The states could have abolished jury trials altogether, and required all controversies to be submitted to the courts without their intervention. The sixth and seventh amendments, in which jury trials are mentioned, apply only to the federal courts, as has been repeatedly adjudged.

§ 951. *The general government; its power to interfere in matters of local concern.*

The government created by the constitution was not designed for the regulation of matters of purely local concern. The states required no aid from any external authority to manage their domestic affairs. They were fully competent to provide for the due administration of justice between their own citizens in their own courts; and they needed no directions in that matter from any other government, any more than they needed directions as to their highways and schools, their hospitals and charitable institutions, their public libraries, or the magistrates they should appoint for their towns and counties. It was only for matters which concerned all the states, and which could not be managed by them in their independent capacity, or managed only with great difficulty and embarrassment, that a general and common government was desired. Whilst they retained control of local matters, it was felt necessary that matters of general and common interest, which they could not wisely and efficiently manage, should be intrusted to a central authority. And so to the common government which grew out of this prevailing necessity was granted exclusive jurisdiction over external affairs, including the great powers of declaring war, making peace, and concluding treaties; but only such powers of internal regulation were conferred as were essential to the successful and efficient working of the government established — to facilitate intercourse and commerce between the people of the different states, and secure to them equality of protection in the several states.

That the central government was created chiefly for matters of a general character, which concerned all the states and their people, and not for matters of interior regulation, is shown as much by the history of its formation as by the express language of the constitution. The Union preceded the constitution. As happily expressed by the late chief justice, "it began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the articles of confederation." *Texas v. White*, 7 Wall., 725 (§§ 140-160, *supra*). Those articles were prepared by the continental congress, which was called to provide measures for the common defense of the colonies against the encroachments of the British crown, and which, failing to secure redress, declared their independence. Its members foresaw that, when the independence of the colonies was established and acknowledged, their condition as separate and independent states would be beset with dangers threatening their peace and safety; that disputes arising from conflicting interests and rivalries, always incident to neighboring nations, would lead to armed collisions and expose them to reconquest by the mother country. To provide against the possibility of evils of this kind, the articles of confederation were prepared and submitted to the legislatures of the several states, and finally, in 1781, were adopted. They declared that the states entered into a firm league of friendship with each other for their common defense; the security of their liberties and their mutual and general welfare; and they bound themselves to assist each other against attacks on account of religion, sovereignty, trade or any other pretense. They clothed the new government created by them with powers supposed to be ample to secure these ends, and declared that there should be freedom of intercourse and commerce between the inhabitants of the several states. They provided for a general congress, and, among other things,

invested it with the exclusive power of determining on peace and war, except in case of invasion of a state by enemies, or imminent danger of such invasion by Indians; of sending and receiving ambassadors; entering into treaties and alliances; of regulating the alloy and value of coin struck by the authority of the states or of the United States; of fixing the standard of weights and measures; of regulating the trade and managing all affairs with the Indians; and of establishing and regulating postoffices from one state to another; and they placed numerous restraints upon the states. But by none of the articles was any interference authorized with the purely internal affairs of the states, or with any of the instrumentalities by which the states administered their governments and dispensed justice among their people; and they declared in terms that each state retained its sovereignty, freedom and independence, and every power, jurisdiction and right which was not by the articles expressly delegated to the United States in congress assembled.

§ 952. *The theory upon which the national government was founded.*

When the government of the confederation failed, chiefly through the want of all coercive authority, to carry into effect its measures—its power being only that of recommendation to the states—and the present constitution was adopted, the same general ends were sought to be attained, namely, the creation of a central government, which would take exclusive charge of all our foreign relations, representing the people of all the states in that respect as one nation, and would at the same time secure at home freedom of intercourse between the states, equality of protection to citizens of each state in the several states, uniformity of commercial regulations, a common currency, a standard of weights and measures, one postal system, and such other matters as concerned all the states and their people. Accordingly, the new government was invested with powers adequate to the accomplishment of these purposes, with which it could act directly upon the people, and not by recommendation to the states, and enforce its measures through tribunals and officers of its own creation. There were also restraints placed upon the action of the states to prevent interference with the authority of the new government, and to secure to all persons protection against punishment by legislative decree, and insure the fulfilment of contract obligations. But the control of matters of purely local concern, not coming within the scope of the powers granted or the restraints mentioned, was left, where it had always existed, with the states. The new government being one of granted powers, its authority was limited by them and such as were necessarily implied for their execution. But lest, from a misconception of their extent, these powers might be abused, the tenth amendment was at an early day adopted, declaring that “the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

§ 953. *The line of separation between the state and national governments.*

Now, if we look into the constitution, we shall not find a single word, from its opening to its concluding line, nor in any of the amendments in force before the close of the civil war, nor, as I shall hereafter endeavor to show, in those subsequently adopted, which authorizes any interference by congress with the states in the administration of their governments, and the enforcement of their laws with respect to any matter over which jurisdiction was not surrendered to the United States. The design of its framers was not to destroy the states, but to form a more perfect union between them, and, whilst creating a central government for certain great purposes, to leave to the states, in all matters the

jurisdiction of which was not surrendered, the functions essential to separate and independent existence. And so the late chief justice, speaking for the court, in 1869, said: "Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the constitution, but it may be not unreasonably said that the preservation of the states and the maintenance of their governments are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the national government;" and then he adds, in that striking language which gives to an old truth new force and significance, that "the constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states." *Texas v. White, supra.*

And Mr. Justice Nelson, also speaking for the court, in 1871, used this language: "The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its spheres is independent of the states." And again: "We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen states were in the possession of this power, and had exercised it at the adoption of the constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the states by their constitutions, which remained unaltered and unimpaired, and in respect to which the state is as independent of the general government as that government is independent of the states." *The Collector v. Day*, 11 Wall., 124-126.

The cases of *Texas v. White* and *The Collector v. Day* were decided after the thirteenth and fourteenth amendments, upon which it is sought to maintain the legislation in question, were adopted; and with their provisions the chief justice and Mr. Justice Nelson, and the court for which they spoke, were familiar. Yet neither they, nor any other judge of the court, suggested that the doctrines announced in the opinions, from which I have quoted, were in any respect modified or affected by the amendments. Nothing, in my judgment, could have a greater tendency to destroy the independence and autonomy of the states; reduce them to a humiliating and degrading dependence upon the central government; engender constant irritation; and destroy that domestic tranquillity which it was one of the objects of the constitution to insure,—than the doctrine asserted in this case, that congress can exercise coercive authority over judicial officers of the states in the discharge of their duties under state laws. It will be only another step in the same direction towards consolidation, when it assumes to exercise similar coercive authority over governors and legislators of the states.

§ 954. *Analogy of the power in the states to use discretion as to extradition.*

The constitution declares that a "person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." And yet in the case of *The Commonwealth of Kentucky v. Denni-*

son, where a fugitive from justice from Kentucky was demanded from the governor of Ohio, and on his refusal application was made to this court for a *mandamus* to compel him to perform his duty in this respect, it was held that there was no clause or provision in the constitution which armed the government of the United States with authority to compel the executive of a state to perform his duty, nor to inflict any punishment for his neglect or refusal. "Indeed, such a power," said Mr. Chief Justice Taney, speaking for the whole court, "would place every state under the control and dominion of the general government even in the administration of its internal concerns and reserved rights." 24 How., 107. And Mr. Justice Nelson, in the case of *Collector v. Day*, where it was held that it was not competent for congress to impose a tax upon the salary of a judicial officer of a state, said that "any government whose means employed in conducting its operations are made subject to the control of another and distinct government, can exist only at the mercy of that government." I could add to these authorities, if anything more were required, that all the recorded utterances of the statesmen who participated in framing the constitution and urging its adoption, and of the publicists and jurists who have since studied its language and aided in the enforcement of its provisions, are inconsistent with the pretension advanced in this case by the counsel of the government.

§ 955. *The selection of jurors a judicial act.*

The duties of the county judge in the selection of jurors were judicial in their nature. They involved the exercise of discretion and judgment. He was to determine who were qualified to serve in that character, and for that purpose whether they possessed sound judgment, and were free from legal exceptions. The law under which he acted had been in force for many years, and had been always considered by the judicial authorities of Virginia to be in conformity with its constitution, which inhibits the legislature from requiring of its judges any other than judicial duties. A test as to the character of an act is found in the power of a writ of *mandamus* to enforce its performance in a particular way. If the act be a judicial one, the writ can only require the judge to proceed in the discharge of his duty with reference to it; the manner of performance cannot be dictated. Here the writ could not command the county judge to select as jurors any particular persons, black or white, but only to proceed and select such as are qualified,—its command in that respect being subject to the limitation incident to all commands of such writs upon judicial officers touching judicial acts.

§ 956. *The purpose of the last amendments.*

The thirteenth and fourteenth amendments are relied upon, as already stated, to support the legislation in question. The thirteenth amendment declares "that neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." The fourteenth amendment, in its first section, which is the only one having any bearing upon the questions involved in this case, declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The fifteenth amendment, which declares

that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color or previous condition of servitude," is not material to the question before us, except as showing that it was only with respect to the suffrage that an interdict was in terms placed against legislation on account of race, color or previous condition of servitude. Equality in their civil rights was in other ways secured to persons of the colored race; and the ballot being assured to them, an effectual means against unjust legislation was placed in their hands. To each of these amendments a clause is added, authorizing congress to enforce its provisions by "appropriate legislation."

The history of the amendments is fresh in the recollection of all of us. They grew out of the late civil war and the events which followed it. They were primarily designed to give freedom to persons of the African race, prevent their future enslavement, make them citizens, prevent discriminating state legislation against their rights as freemen, and secure to them the ballot. The generality of the language used necessarily extends some of their provisions to all persons of every race and color; but in construing the amendments and giving effect to them, the occasion of their adoption and the purposes they were designed to attain should be always borne in mind. Nor should it be forgotten that they are additions to the previous amendments, and are to be construed in connection with them and the original constitution as one instrument. They do not, in terms, contravene or repeal anything which previously existed in the constitution and those amendments. Aside from the extinction of slavery, and the declaration of citizenship, their provisions are merely prohibitory upon the states; and there is nothing in their language or purpose which indicates that they are to be construed or enforced in any way different from that adopted with reference to previous restraints upon the states. The provision authorizing congress to enforce them by appropriate legislation does not enlarge their scope, nor confer any authority which would not have existed independently of it. No legislation would be appropriate which should contravene the express prohibitions upon congress previously existing, as, for instance, that it should not pass a bill of attainder or an *ex post facto* law. Nor would legislation be appropriate which should conflict with the implied prohibitions upon congress. They are as obligatory as the express prohibitions. The constitution, as already stated, contemplates the existence and independence of the states in all their reserved powers. If the states were destroyed, there could, of course, be no United States. In the language of this court, in *The Collector v. Day*, "without them the general government itself would disappear from the family of nations." Legislation could not, therefore, be appropriate which, under pretense of prohibiting a state from doing certain things, should tend to destroy it, or any of its essential attributes. To every state, as understood in the American sense, there must be, with reference to the subjects over which it has jurisdiction, absolute freedom from all external interference in the exercise of its legislative, judicial and executive authority. Congress could not undertake to prescribe the duties of a state legislature and the rules it should follow, and the motives by which it should be governed, and authorize criminal prosecutions against the members if its directions were disregarded; for the independence of the legislature is essential to the independence and autonomy of the state. Congress could not lay down rules for the guidance of the state judiciary, and prescribe to it the law and the motives by which it should be controlled, and if these were disregarded, direct criminal proceedings against

its members; because a judiciary independent of external authority is essential to the independence of the state, and also, I may add, to a just and efficient administration of justice in her courts. Congress could not dictate to the executive of a state the bills he might approve, the pardons and reprieves he might grant, or the manner in which he might discharge the functions of his office, and assume to punish him if its dictates were disregarded, because his independence, within the reserved powers, is essential to that of the state. Indeed, the independence of a state consists in the independence of its legislative, executive and judicial officers, through whom alone it acts. If this were not so, a state would cease to be a self-existing and an indestructible member of the Union, and would be brought to the level of a dependent municipal corporation, existing only with such powers as congress might prescribe.

§ 957. *History and purpose of the thirteenth amendment.*

I cannot think I am mistaken in saying that a change so radical in the relation between the federal and state authorities as would justify legislation interfering with the independent action of the different departments of the state governments, in all matters over which the states retain jurisdiction, was never contemplated by the recent amendments. The people in adopting them did not suppose they were altering the fundamental theory of their dual system of governments. The discussions attending their consideration in congress, and before the people, when presented to the legislatures of the states for adoption, can be successfully appealed to in support of this assertion. The Union was preserved at a fearful cost of life and property. The institution of slavery in a portion of the country was the cause of constant irritation and crimination between the people of the states where it existed and those of the free states, which finally led to a rupture between them and to the civil war. As the war progressed its sacrifices and burdens filled the people of the loyal states with a determination that not only should the Union be preserved, but that the institution which, in their judgment, had threatened its dissolution should be abolished. The emancipation proclamation of President Lincoln expressed this determination, though placed on the ground of military necessity. The thirteenth amendment carried it into the organic law. That amendment prohibits slavery and involuntary servitude, except for crime, within the United States, or any place subject to their jurisdiction. Its language is not restricted to the slavery of any particular class. It applies to all men; and embraces in its comprehensive language not merely that form of slavery which consists in the denial of personal rights to the slave, and subjects him to the condition of a chattel, but also serfage, vassalage, peonage, villeinage, and every other form of compulsory service for the benefit, pleasure or caprice of others. It was intended to render every one within the domain of the republic a freeman, with the right to follow the ordinary pursuits of life without other restraints than such as are applied to all others, and to enjoy equally with them the earnings of his labor. But it confers no political rights; it leaves the states free, as before its adoption, to determine who shall hold their offices and participate in the administration of their laws. A similar prohibition of slavery and involuntary servitude was in the constitution of several states previous to its adoption by the United States; and it was never held to confer any political rights.

On the 18th of December, 1865, this amendment was ratified, that is, the official proclamation of its ratification was then made; and in April of the following year the Civil Rights Act was passed. Its first section declares that all persons born in the United States, and not subject to any foreign power, ex-

cluding Indians not taxed, are "citizens of the United States," and that "such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, of which the party shall have been duly convicted, shall have the same right in every state and territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white persons." This legislation was intended to secure to all persons in the United States practical freedom. But its validity was questioned in many quarters entitled to consideration, and some of its provisions not long afterwards were declared by state courts to be beyond the constitutional authority of congress. *Bowlin v. Commonwealth*, 2 Bush (Ky.), 15.

§ 958. *The causes which led to the fourteenth amendment.*

There were also complaints made that notwithstanding the amendment abolishing slavery and involuntary servitude, except for crime, the freedmen were, by legislation in some of the southern states, subjected to such burdensome disabilities in the acquisition and enjoyment of property and the pursuit of happiness, as to render their freedom of little value. *Slaughter-House Cases*, 16 Wall., 36 (§§ 752-801, *supra*). There were, besides, complaints of the existence, in those sections, of a feeling of dislike towards citizens of the north seeking residence there, and towards such of their own citizens as had adhered to the national government during the war, which could not fail to find expression in hostile and discriminating legislation. It is immaterial whether these complaints were justified or not; they were believed by many persons to be well founded. To remove the cause of them; to obviate objections to the validity of legislation similar to that contained in the first section of the Civil Rights Act; to prevent the possibility of hostile and discriminating legislation in future by a state against any citizen of the United States, and the enforcement of any such legislation already had; and to secure to all persons within the jurisdiction of the states the equal protection of the laws,—the first section of the fourteenth amendment was adopted. Its first clause declared who are citizens of the United States and of the states. It thus removed from discussion the question, which had previously been debated, and though decided, not settled, by the judgment in the *Dred Scott Case*, whether descendants of persons brought to this country and sold as slaves were citizens, within the meaning of the constitution. It also recognized, if it did not create, a national citizenship, as contradistinguished from that of the states. But the privilege or the duty, whichever it may be called, of acting as a juror in the courts of the county, is not an incident of citizenship. Women are citizens; so are the aged above sixty, and children in their minority; yet they are not allowed in Virginia to act as jurors. Though some of these are in all respects qualified for such service, no one will pretend that their exclusion by law from the jury list impairs their rights as citizens.

The second clause of the first section of the amendment declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In *Slaughter-House Cases* it was held by a majority of the court that this clause had reference only to privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states, and, therefore, did not apply to those fundamental civil rights which belong to citizens of all free governments, such as



the right to acquire and enjoy property and pursue happiness, subject only to such just restraints as might be prescribed for the general good. If this construction be correct, there can be no pretense that the privilege or duty of acting as a juror in a state court is within the inhibition of the clause. Nor could it be within that inhibition if a broader construction were given to the clause, and it should be held, as contended by the minority of the court in Slaughter-House Cases, that it prohibits the denial or abridgment by any state of those fundamental privileges and immunities which of right belong to citizens of all free governments; and with which the declaration of independence proclaimed that all men were endowed by their Creator, and to secure which governments were instituted among men. These fundamental rights were secured, previous to the amendment, to citizens of each state in the other states, by the second section of the fourth article of the constitution, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Among those privileges and immunities it was never contended that jury duty or jury service was included.

§ 959. *The third clause of the first section of the fourteenth amendment construed.*

The third clause in the first section of the amendment declares that no state "shall deprive any person of life, liberty or property without due process of law." It will not be contended that this clause confers upon the citizen any right to serve as a juror in the state courts. It exists in the constitution of nearly all the states, and is only an additional security against arbitrary deprivation of life and liberty, and arbitrary spoliation of property. It means that neither can be taken, or the enjoyment thereof impaired, except in the course of the regular administration of the law in the established tribunals. The existence of this clause in the amendment is to me a persuasive argument that those who framed it, and the legislatures of the states which adopted it, never contemplated that the prohibition was to be enforced in any other way than through the judicial tribunals, as previous prohibitions upon the states had always been enforced. If congress could, as an appropriate means to enforce the prohibition, prescribe criminal prosecutions for its infraction against legislators, judges, and other officers of the states, it would be authorized to frame a vast portion of their laws; for there are few subjects upon which legislation can be had besides life, liberty and property. In determining what constitutes a deprivation of property, it might prescribe the conditions upon which property shall be acquired and held, and declare as to what subjects property rights shall exist. In determining what constitutes deprivation of liberty, it might prescribe in what way and by what means the liberty of the citizen shall be deemed protected. In prescribing punishment for deprivation of life, it might prescribe a code of criminal procedure. All this and much more might be done if it once be admitted, as the court asserts in this case, that congress can authorize a criminal prosecution for the infraction of the prohibitions. It cannot prescribe punishment without defining crime, and therefore must give expression to its own views as to what constitutes protection to life, liberty and property.

§ 960. *"Equal protection of the laws" not denied to the colored race by the exclusion of colored jurors.*

The fourth clause in the first section of the amendment declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Upon this clause the counsel of the district judge chiefly rely to sus-

tain the validity of the legislation in question. But the universality of the protection secured necessarily renders their position untenable. All persons within the jurisdiction of the state, whether permanent residents or temporary sojourners, whether old or young, male or female, are to be equally protected. Yet no one will contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests. The equality of protection intended does not require that all persons shall be permitted to participate in the government of the state and the administration of its laws, to hold its offices, or be clothed with any public trusts. As already said, the universality of the protection assured repels any such conclusion.

§ 961. *What is meant by the term "equal protection of the laws."*

The equality of the protection secured extends only to civil rights as distinguished from those which are political, or arise from the form of the government and its mode of administration. And yet the reach and influence of the amendment are immense. It opens the courts of the country to every one, on the same terms, for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts; it assures to every one the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness, to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others; and in the administration of criminal justice it permits no different or greater punishment to be imposed upon one than such as is prescribed to all for like offenses. It secures to all persons their civil rights upon the same terms; but it leaves political rights, or such as arise from the form of government and its administration, as they stood previous to its adoption. It has no more reference to them than it has to social rights and duties, which do not rest upon any positive law, though they are more potential in controlling the intercourse of individuals. In the consideration of questions growing out of these amendments much confusion has arisen from a failure to distinguish between the civil and the political rights of citizens. Civil rights are absolute and personal. Political rights, on the other hand, are conditioned and dependent upon the discretion of the elective or appointing power, whether that be the people acting through the ballot, or one of the departments of their government. The civil rights of the individual are never to be withheld, and may be always judicially enforced. The political rights which he may enjoy, such as holding office and discharging a public trust, are qualified because their possession depends on his fitness, to be adjudged by those whom society has clothed with the elective authority. The thirteenth and fourteenth amendments were designed to secure the civil rights of all persons, of every race, color and condition; but they left to the states to determine to whom the possession of political powers should be intrusted. This is manifest from the fact that when it was desired to confer political power upon the newly made citizens of the states, as was done by inhibiting the denial to them of the suffrage on account of race, color or previous condition of servitude, a new amendment was required.

The doctrine of the district judge, for which the counsel contend, would lead to some singular results. If, when a colored person is accused of a criminal offense, the presence of persons of his race on the jury by which he is to be tried is essential to secure to him the equal protection of the laws, it would seem that the presence of such persons on the bench would be equally essential,

if the court should consist of more than one judge, as in many cases it may; and if it should consist of a single judge, that such protection would be impossible. A similar objection might be raised to the composition of any appellate court to which the case, after verdict, might be carried.

The position that in cases where the rights of colored persons are concerned, justice will not be done to them unless they have a mixed jury, is founded upon the notion that in such cases white persons will not be fair and honest jurors. If this position be correct, there ought not to be any white persons on the jury where the interests of colored persons only are involved. That jury would not be an honest or fair one, of which any of its members should be governed in his judgment by other considerations than the law and the evidence; and that decision would hardly be considered just which should be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other. To be consistent, those who hold this notion should contend that in cases affecting members of the colored race only, the juries should be composed entirely of colored persons, and that the presiding judge should be of the same race. To this result the doctrine asserted by the district court logically leads. The jury *de medietate linguæ*, anciently allowed in England for the trial of an alien, was expressly authorized by statute, probably as much because of the difference of language and customs between him and Englishmen, and the greater probability of his defense being more fully understood, as because it would be heard in a more friendly spirit by jurors of his own country and language. If these views as to the purport and meaning of the thirteenth and fourteenth amendments to the constitution be correct, there is no warrant for the act of congress under which the indictment in this case was found, and the arrest and imprisonment of the petitioner were unlawful, and his release should be ordered.

§ 962. *The act of congress providing for the punishment of state judges for excluding colored men from juries on account of their color is unconstitutional.*

The case is one which should not be delayed for the slow process of a trial in the court below, and a subsequent appeal, in case of conviction, to this court, to be heard years hence. The commonwealth of Virginia has represented to us that the services of her judicial officer are needed in her courts for the administration of justice between her citizens, and she asks that the highest tribunal of the Union will release him from his unlawful arrest, in order that he may perform the duties of his office. Those who regard the independence of the states in all their reserved powers,—and this includes the independence of their legislative, judicial and executive departments,—as essential to the successful maintenance of our form of government, cannot fail to view with the gravest apprehension for the future, the indictment, in a court of the United States, of a judicial officer of a state for the manner in which he has discharged his duties under her laws, and of which she makes no complaint. The proceeding is a gross offense to the state; it is an attack upon her sovereignty in matters over which she has never surrendered her jurisdiction. The doctrine which sustains it, carried to its logical results, would degrade and sink her to the level of a mere local municipal corporation; for if congress can render an officer of a state criminally liable for the manner in which he discharges his duties under her laws, it can prescribe the nature and extent of the penalty to which he shall be subjected on conviction; it may imprison him for life, or punish him by removal from office. And if it can make the exclusion of persons from jury service on account of race or color a criminal offense, it can

make their exclusion from office on that account also criminal; and, adopting the doctrine of the district judge in this case, the failure to appoint them to office will be presumptive evidence of their exclusion on that ground. To such a result are we logically led. The legislation of congress is founded, and is sustained by this court, as it seems to me, upon a theory as to what constitutes the equal protection of the laws, which is purely speculative, not warranted by any experience of the country, and not in accordance with the understanding of the people as to the meaning of those terms since the organization of the government.

## NEAL v. DELAWARE.

(13 Otto, 370-409. 1880.)

ERROR to the Court of Oyer and Terminer of New Castle County, Delaware.

STATEMENT OF FACTS.—Neal, a colored man, was indicted in the state court for the crime of rape. He filed a petition for the removal of the cause to the federal court, on the ground that in summoning jurors to serve on the grand and petit juries the court had excluded colored persons. The petition was overruled. He then moved to quash the indictment and the lists and panels of grand and petit jurors, setting forth the grounds alleged in his petition for removal. This motion was also overruled, as well as a motion to be permitted to produce witnesses in support of the motion to quash. The Delaware law, and further facts in the case, are stated in the opinion.

Opinion by MR. JUSTICE HARLAN.

The assignments of error are numerous, but they are all embraced by the general proposition that the court erred as well in proceeding with the case after the petition for removal was filed, as in denying the motions to quash the indictment, and the panels of jurors.

The first question to which our attention will be directed relates to the assertion, by the accused, of the right of removal under section 641 of the Revised Statutes. That section declares that, "When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied, or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of the citizens of the United States, . . . such suit or prosecution may, upon the petition of such defendant filed in said state court at any time before the trial or final hearing of the cause, stating the facts, and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state court shall cease," etc.

§ 963. *Cases cited.*

In *Strauder v. West Virginia*, 100 U. S., 303 (§§ 920-928, *supra*); *Virginia v. Rives*, id., 313 (§§ 929-940, *supra*), and *Ex parte Virginia*, id., 339 (§§ 941-962, *supra*), that section was the subject of careful examination in connection with section 1977, which declares that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white persons, and shall be subject to like pains, penalties, taxes, licenses and exactions of every kind, and no other." We also considered the validity and scope of the act of March 1, 1875, c. 114, which, among

other things, declares that "no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified from service as grand or petit jurors in any court of the United States, or of any state, on account of race, color or previous condition of servitude." 18 Stat., pt. 3, p. 335.

§ 964. *Construction of statutes securing civil rights to persons of African descent.*

In those cases it was ruled that these statutory enactments were constitutional exertions of the power to pass appropriate legislation for the enforcement of the provisions of the fourteenth amendment, which was designed, primarily, as we held, to secure to the colored race, thereby invested with the rights, privileges and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons; that while a state, consistently with the purposes for which that amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages or to persons having educational qualifications, a denial to citizens of the African race, because of their color, of the right or privilege accorded to white citizens, of participating as jurors in the administration of justice, is a discrimination against the former inconsistent with the amendment, and within the power of congress, by appropriate legislation, to prevent; that to compel a colored man to submit to a trial before a jury drawn from a panel from which was excluded, because of their color, every man of his race, however well qualified by education and character to discharge the functions of jurors, was a denial of the equal protection of the laws; and that such exclusion of the black race from juries because of their color was not less forbidden by law than would be the exclusion from juries, in the states where the blacks have the majority, of the white race, because of *their* color.

§ 965. *Construction of the fourteenth amendment of the constitution.*

But it was also ruled, in the cases cited, that the constitutional amendment was broader than the provisions of section 641 of the Revised Statutes; that since that section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence; that for denials arising from judicial action, after the trial commenced, the remedy lay in the revisory power of the higher courts of the state, and, ultimately, in the power of review which this court may exercise over their judgments, whenever rights, privileges or immunities, secured by the constitution or laws of the United States, are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the states, rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the state, rather than a denial first made manifest at the trial of the case. We held that congress had not authorized a removal where jury commissioners or other subordinate officers had, without authority derived from the constitution and laws of the state, excluded colored citizens from juries because of their race. The essential question, therefore, is whether, at the time the petition for removal was filed, citizens of the African race, otherwise qualified, were, by reason of the constitution and laws of Delaware, excluded from service on juries because of their color. The court below, all the judges concurring, held that no such exclusion was required or authorized by the constitution or laws of the state, and, consequently, that the

case was not embraced by the removal statute as construed by this court. The correctness of this position will now be considered.

§ 966. *Provisions of the constitution of Delaware on the right of suffrage.*

The constitution of Delaware, adopted in 1831 (the words of which upon the subject of suffrage had not been changed when the petition for removal was filed, nor since), restricts the right of suffrage at general elections to free white male citizens, of the age of twenty-one years and upwards, who had resided in the state one year next before the election, and the last month thereof in the county where he offers to vote, and who, within two years next before the election, had paid a county tax, which shall have been assessed at least six months before such election,—the prerequisite of a payment of tax being dispensed with in the case of free white male citizens between twenty-one and twenty-two years of age, having the prescribed residence in the state and county. The only persons excluded by that constitution from suffrage are those in the military, naval or marine service of the United States, stationed in Delaware, idiots, insane persons, paupers, and those convicted of felonies.

§ 967. *Persons liable to jury duty under the statute of Delaware.*

The statute of Delaware, adopted in 1848, and in force at the trial of this case, provides for an annual selection, by the levy court of the county, of persons to serve as grand and petit jurors, and from those so selected the prothonotary and clerk of the peace are required to draw the names of such as shall serve for that year, if summoned. It further provides that all qualified to vote at the general election, being "sober and judicious persons," shall be liable to serve as jurors, except public officers of the state or of the United States, counselors and attorneys at law, ordained ministers of the gospel, officers of colleges, teachers of public schools, practicing physicians and surgeons regularly licensed, cashiers of incorporated banks, and all persons over seventy years of age. It is thus seen that the statute, by its reference to the constitutional qualifications of voters, apparently restricts the selection of jurors to white male citizens being voters, and sober and judicious persons. And although it only declares that such citizens shall be liable to serve as jurors, the settled construction of the state court, prior to the adoption of the fifteenth amendment, was that no citizen of the African race was competent, under the law, to serve on a jury.

Now, the argument on behalf of the accused is, that since the statute adopted the standard of voters as the standard for jurors, and since Delaware has never, by any separate or official action of its own, changed the language of its constitution in reference to the class who may exercise the elective franchise, the state is to be regarded, in the sense of the amendment and of the laws enacted for its enforcement, as denying to the colored race within its limits to this day, the right, upon equal terms with the white race, to participate as jurors in the administration of justice,—and this notwithstanding the adoption of the fifteenth amendment and its admitted legal effect upon the constitutions and laws of all the states of the Union. But to this argument, when urged in the court below, the state court replied, as does the attorney-general of the state here, that although the state had never, by a convention or popular vote, formally abrogated the provision in its state constitution restricting suffrage to white citizens, that result had necessarily followed, as matter of law, from the incorporation of the fourteenth and fifteenth amendments into the fundamental law of the nation; that since the adoption of the latter amendment neither the legislative, executive nor judicial authorities of the state had, in any mode, recognized, as an existing part of its constitution, that provision

which, in words, discriminates against citizens of the African race in the matter of suffrage; and, consequently, that the statute prescribing the qualification of jurors by reference to the qualifications for voters should be construed as referring to the state constitution, as modified or affected by the fifteenth amendment.

§ 968. *The fifteenth amendment abrogated the provision of the Delaware constitution which limited the right of suffrage to the white race.*

The question thus presented is of the highest moment to that race, the security of whose rights of life, liberty and property, and to the equal protection of the laws, was the primary object of the recent amendments to the national constitution. Its solution is confessedly attended by many difficulties of a serious nature, which might have been avoided by more explicit language in the statutes passed for the enforcement of the amendments. Much has been left by the legislative department to mere judicial construction. But upon the fullest consideration we have been able to give the subject, our conclusion is that the alleged discrimination in the state of Delaware, against citizens of the African race, in the matter of service on juries, does not result from her constitution and laws.

§ 969. *The fifteenth amendment confers upon the colored race the privilege and duty of serving on juries in Delaware.*

Beyond question the adoption of the fifteenth amendment had the effect, in law, to remove from the state constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualifications of jurors was, itself, enlarged in its operation, so as to embrace all who by the state constitution, as modified by the supreme law of the land, were qualified to vote at a general election. The presumption should be indulged, in the first instance, that the state recognizes, as is its plain duty, an amendment of the federal constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced, within its limits, without reference to any inconsistent provisions in its own constitution or statutes. In this case, that presumption is strengthened, and, indeed, becomes conclusive, not only by the direct adjudication of the state court as to what is the fundamental law of Delaware, but by the entire absence of any statutory enactments or any adjudication, since the adoption of the fifteenth amendment, indicating that the state, by its constituted authorities, does not recognize, in the fullest legal sense, the binding force of that amendment and its effect in modifying the state constitution upon the subject of suffrage. This abundantly appears from the separate opinions, in this case, of the judges composing the court of oyer and terminer. Comegys, C. J., alluding to the fifteenth amendment, and the act of March 1, 1875, said:

“Returning to the point — that our laws forbid the selection of colored persons as jurors. We answer this by saying that we have no such laws. . . . The fourteenth amendment, therefore, and the act of 1875, passed by congress as appropriate legislation for its enforcement, or either, are superior to our state constitution, and it had to give way to them, and it did so give way, and was repealed, so far as the word ‘white’ is mentioned therein as a qualification for a voter at a general election, as soon as the amendment was proclaimed to be adopted, and has been so understood and treated by all persons in this state from that time forth. Ever since the last civil rights bill was passed by congress, negroes have been admitted as witnesses in all cases, civil and criminal,

tried in our courts; whereas, before, they could give no evidence in any such cases against a white person except in case of crime, and to prevent a failure of justice, when no white person was present at the time of the transaction competent to give testimony. There is, then, an excision or erasure of the word 'white' in the qualification of voters in this state; and the constitution is now to be construed as if such word had never been there. We have, then, no law of this state forbidding the levy court to select negroes as jurors, because they are negroes, if in their judgment they are otherwise qualified." Wales, J., said: "We know, from actual and personal knowledge of the history of the times, that since the adoption of the fifteenth amendment to the federal constitution the provision in the constitution of Delaware limiting the right to vote to free white male citizens has been virtually and practically repealed and annulled, and that persons of color, otherwise qualified, have exercised and continue to exercise the elective franchise in all parts of this state with the same freedom as the whites. It is not necessary to prove this fact. . . . But there is really no difficulty in reaching the conclusion that under the law regulating the selection of jurors the colored citizen is not excluded. That law was intended by its authors to be prospective in its operation and effect, and to include all who would become voters after its passage, as well as the class of persons who were then entitled to vote. It was not a temporary statute, intended only to provide for the then existing state of things, but to reach forward and make one unvarying standard for the qualification of a juror, to wit, that he should be qualified to vote at the general election. This was not the sole standard, but it is the only one pertinent to the discussion of the motion to remove. Whoever thereafter might become qualified voters in the state, whether by virtue of amendment to its constitution or by virtue of 'the supreme law of the land,' that overrides and supplants state constitutions and state laws, *eo instanti* became qualified for selection and service as jurors. . . . The right secured to the colored man under the fourteenth amendment and the civil rights laws is that he shall not be discriminated against solely on account of his race or color, and it follows that no state law can for that cause alone exclude him from the jury box, nor can a state officer be permitted, in the performance of his official duties, to purposely keep the colored man off the jury lists." Houston, J., concurred in the opinion of the other judges, and expressed his surprise that the petition for removal contained the statement that the colored man is not a voter in Delaware by its constitution and laws. That, he said, "is not true and ought not to be asserted, because there is not a lawyer of any political party that has ever doubted, since the adoption of the fourteenth amendment to the constitution of the United States, that the word 'white,' in our constitution, was entirely stricken out. That goes to the root of the whole matter, and there is no discrimination in the constitution or laws of our state against colored men as jurors."

§ 970. *A cause is not removable under section 641 unless the laws of the state discriminate against the applicant.*

There is another consideration upon this branch of the case which is entitled to weight. In some of the states, particularly those in which slavery formerly existed, no alteration of the constitution was possible except in the particular mode prescribed, unless, indeed, the people assumed to disregard the express limitations which their own fundamental law imposed upon the power of amendment. If the constitution is obeyed, no alteration of its provisions could, in some of the states, be effected short of several years. And if the



position taken by counsel be correct, so long as the mere language of the constitution, as originally framed and adopted by a state, is inconsistent with that equality of civil rights secured by the recent amendments to the federal constitution, every civil suit or criminal prosecution in that state against a colored man would be removable, under section 641 of the Revised Statutes, into the circuit court of the United States, although the state, by all its organs of authority — legislative, executive and judicial — should, without reservation or qualification, recognize the legal effect as well of the amendments as of the statutes enacted to enforce them. We cannot believe that the section was intended by congress to be so far-reaching in its results, or that a reasonable construction of it requires us to hold that the state of Delaware, by its constitution and laws, denies or prevents or impairs the enforcement, in its judicial tribunals, of rights secured by any law providing for the equal civil rights of citizens of the United States. Had the state, since the adoption of the fourteenth amendment, passed any statute in conflict with its provisions, or with the laws enacted for their enforcement, or had its judicial tribunals, by their decisions, repudiated that amendment as a part of the supreme law of the land, or declared the acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that there was such a denial, upon its part, of equal civil rights, or such an inability to enforce them in those tribunals as, under the constitution and within the meaning of that section, would authorize a removal of the suit or prosecution to the circuit court of the United States. No such case is presented here. The discrimination complained of does not result from the constitution or laws of the state, as expounded by its highest judicial tribunal; and, consequently, it could not be made manifest until after the action of the state court in the case commenced. The prosecution against the plaintiff in error was not, therefore, removable into the circuit court, under section 641. In thus construing the statute we do not withhold from a party claiming that he is denied, or cannot enforce in the judicial tribunals of the state, his constitutional equality of civil rights, all opportunity of appealing to the courts of the Union for the redress of his wrongs. For, if not entitled, under the statute, to the removal of the suit or prosecution, he may, when denied, in the subsequent proceedings of the state court, or in the execution of its judgment any right, privilege or immunity given or secured to him by the constitution or laws of the United States, bring the case here for review. What we have said leads to the conclusion that the state court did not err in refusing to grant the prayer of the petitioner for removal.

§ 971. *A colored defendant in Delaware is entitled to prove, on a motion to quash an indictment, that the officers summoning jurors purposely excluded colored persons on account of their race and color.*

The remaining question relates to the denial of the motions to quash the indictment and the panels of jurors. The grounds upon which the motions are placed were formally and distinctly stated, and are fully set out in the bill of exceptions. They were the same as those assigned in the verified petition filed by the accused for the removal of the prosecution into the circuit court of the United States, viz., that from the grand jury that found, and from the petit jury that was summoned to try, the indictment, citizens of the African race, qualified in all respects to serve as jurors, were excluded from the panels, because of their race and color; and that, in fact, persons of that race, though possessing all the requisite qualifications, have always, in that county and state, been excluded because of their race from serving on juries. That colored per-

sons have always been excluded from juries in the courts of Delaware was conceded in argument, and was likewise conceded in the court below. The chief justice, however, accompanied that concession with the remark in reference to this case, "that none but white men were selected is in nowise remarkable in view of the fact — too notorious to be ignored — that the great body of black men residing in this state are utterly unqualified, by want of intelligence, experience or moral integrity, to sit on juries." The exceptions, he said, were rare.

Although for the reasons we have given the prisoner was not entitled to a removal of this prosecution into the circuit court of the United States, he is not without remedy if the officers of the state charged with the duty of selecting jurors were guilty of the offense charged in his petition. A denial upon their part of his right to a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the constitution and laws of the United States, which the trial court was bound to redress. As said by us in *Virginia v. Rives, supra*, "The court will correct the wrong, will quash the indictment, or the panel; or, if not, the error will be corrected in a superior court," and ultimately in this court upon review.

We repeat what was said in that case, that while a colored citizen, party to a trial involving his life, liberty or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not, within the meaning of the constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, "that in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them, because of their color." So that we need only inquire whether, upon the showing made by the accused, the court erred in overruling the motions to quash the indictment and the panels of jurors.

We are informed by the bill of exceptions that when the motions to quash were made, it was agreed between the state, by its attorney-general, and the prisoner, by his counsel, with the assent of the court, that the statements and allegations in the petition for removal "should be taken and treated, and given the same force and effect, in the consideration and decision" of the motions, "as if said statements and allegations were made and verified by the defendant in a separate and distinct affidavit." The only object which the prisoner's counsel could have had in filing the affidavit was to establish the grounds upon which the motions to quash were rested. It was in the discretion of the court to hear the motions upon affidavit. No counter affidavits were filed in behalf of the prosecution. Nor does it appear that, on the hearing of the motions, the state controverted, in any form, the allegation, made with the utmost directness, that her officers had purposely excluded from the juries, because of their color, citizens of the African race, qualified to perform jury service. Nor does the bill of exceptions disclose any suggestion or intimation, by the state, of any objection to the prisoner's affidavit as evidence in support of the motions. Under these circumstances, without any evidence, by affidavit or otherwise, upon the part of the state, the motions to quash were submitted for determination. They were overruled, upon the ground that "no evidence had been produced, or offered by the accused," to prove that the alleged exclusion of colored persons from the juries was because of their color. The court said that such fact of exclusion could not be established by the circumstance that no persons of the African race were, in fact, on the panels; but "should

have been proven affirmatively on the part of the defendant, and by competent testimony, outside of his affidavit, before said motions to quash could be granted."

Thereupon, before the accused had even been arraigned, or had pleaded to the indictment, he further moved the court to permit him to produce, as witnesses, in support of the motions to quash, "the commissioners of the levy court, and the clerk and bailiff of said levy court, and that the court should issue by its clerk subpoenas for said persons as witnesses to testify as aforesaid." To the granting of that motion the attorney-general of the state objected, and his objection was sustained. The bill shows that the motion to go into further proof was denied "on the ground that full time to produce such witnesses to make such proof had existed before the motion was heard; that application for leave to summon witnesses to support a motion which had been argued and refused, because of want of proof, when sufficient time had existed for its production, was without precedent in the court of oyer and terminer in this state, and, therefore, in this case, the motion must be treated as coming too late to be granted."

§ 972. *The uncontradicted affidavit of the prisoner held sufficient to sustain a motion to quash.*

It may be argued that the ruling of the court whereby the prisoner was denied the privilege, after the motions to quash were overruled, and before the trial commenced, of making further proof in support of the charge that both grand and petit juries had been selected in violation of the constitution and laws of the United States, is not the subject of review in this court. Without discussing that proposition, we may remark, with entire respect for the court below, that the circumstances, in our judgment, warranted more indulgence, in the matter of time, than was granted to a prisoner whose life was at stake, and who was too poor to employ counsel of his own selection. If it be suggested that the commissioners, when summoned, could not have been compelled to testify, it may be answered that they might not have claimed any such exemption. But that objection, however plausible or weighty, did not apply to the clerk and bailiff of the levy court. The clerk of the court of oyer and terminer was himself, as we are advised by the opinion of the chief justice, the clerk of the levy court, attending its sessions and assisting in the transaction of its business. That officer, we may presume, was present in court when the application to examine him as a witness was made. He and the bailiff were in a position, perhaps, to clearly sustain or clearly disprove the allegation that the grand and petit juries were organized upon the principle of excluding therefrom all colored persons, because of their race,—a charge involving the fairness and integrity of the whole proceeding against the prisoner.

But passing by this ruling of the court below as insufficient, in itself, to authorize a reversal of the judgment, we are of opinion that the motions to quash, sustained by the affidavit of the accused,—which appears to have been filed in support of the motions, without objection to its competency as evidence, and was uncontradicted by counter affidavits, or even by a formal denial of the grounds assigned,—should have been sustained. If, under the practice which obtains in the courts of the state, the affidavit of the prisoner could not, if objected to, be used as evidence in support of a motion to quash, the state could waive that objection, either expressly or by not making it at the proper time. No such objection appears to have been made by its attorney-general. On the contrary, the agreement that the prisoner's verified petition

should be treated as an affidavit "in the consideration and decision" of the motions, implied, as we think, that the state was willing to risk their determination upon the case as made by that affidavit, in connection, of course, with any facts of which the court might take judicial notice.

§ 973. *Facts showing discrimination on account of race and color.*

The showing thus made, including, as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the state,—although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand,—presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the state court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience or moral integrity, to sit on juries.

§ 974. *The refusal of the state to redress wrongs committed by its officers is a denial of a right.*

The action of those officers in the premises is to be deemed the act of the state, and the refusal of the state court to redress the wrong by them committed was a denial of a right secured to the prisoner by the constitution and laws of the United States. Speaking by Mr. Justice Strong, in *Ex parte Virginia*, we said, and now repeat, that "a state acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's authority, his act is that of the state. This must be, or the constitutional prohibition has no meaning."

The judgment of the court of oyer and terminer will be reversed, with directions to set aside the judgment and verdict, as well as the order denying the motion to quash the indictment and panels of jurors, and for such proceedings, upon a further hearing of those motions, as may be consistent with the principles of this opinion; and it is so ordered.

The CHIEF JUSTICE and MR. JUSTICE FIELD dissented.

#### BLYEW v. UNITED STATES.

(13 Wallace, 581-601. 1871.)

ERROR to U. S. Circuit Court, District of Kentucky.

STATEMENT OF FACTS.—Blyew and Kennard, white persons, were indicted in the circuit court of the United States for the murder of Lucy Armstrong, a colored woman. For the purpose of conferring jurisdiction on the circuit court the race and citizenship of Lucy Armstrong were alleged, and that certain

colored persons who witnessed the murder were denied the right to testify against the defendants in the state courts on account of their race and color.

§ 975. *Jurisdiction of the federal courts over crimes committed within a state.*

Opinion by MR. JUSTICE STRONG.

Addressing ourselves to the first of the questions presented by the record — the question of jurisdiction — it may be remarked that clearly the circuit court had no jurisdiction of the crime of murder committed within the district of Kentucky, unless it was conferred by the third section of the act of congress of April 9, 1866. It must be admitted that the crimes and offenses of which the district courts are, by this section, given exclusive jurisdiction are only those which are against the provisions of the act, or those enumerated in the second and sixth sections, and that the “causes, civil and criminal,” over which jurisdiction is, by the second clause of the section, conferred upon the district and circuit courts of the United States concurrently, are other than those of which exclusive jurisdiction is given to the district courts. They are described as causes “affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any of the rights secured to them by the first section of the act.”

§ 976. *The act of April 9, 1866, does not confer upon the courts of the United States jurisdiction in cases in which colored persons are material witnesses and are not permitted to testify by the laws of the state.*

Was, then, the prosecution or indictment against these defendants a cause affecting any such person or persons? If it was, then by the provisions of the act it was within the jurisdiction of the court, and if it was not, that court had no jurisdiction. It was, the record shows, an indictment for the murder of Lucy Armstrong, a citizen of the United States of the African race, and it contained an averment that other citizens of the United States of the same race witnessed the alleged murder. It contained also an averment that those other persons, namely, Richard Foster and Laura Foster, as well as the deceased Lucy Armstrong, were, on account of their race and color, denied the right to testify against the defendants, or either of them, of and concerning the killing and murder, in the courts and judicial tribunals of the state of Kentucky.

We are thus brought to the question whether a criminal prosecution for a public offense is a cause “affecting,” within the meaning of the act of congress, persons who may be called to testify therein. Obviously the only parties to such a cause are the government and the persons indicted. They alone can be reached by any judgment that may be pronounced. No judgment can either enlarge or diminish the personal, relative or property rights of any others than those who are parties. It is true there are some cases which may affect the rights of property of persons who are not parties to the record. Such cases, however, are all of a civil nature, and none of them even touch rights of person. But an indictment prosecuted by the government against an alleged criminal is a cause in which none but the parties can have any concern, except what is common to all the members of the community. Those who may possibly be witnesses, either for the prosecution or for the defense, are no more affected by it than is every other person, for any one may be called as a witness. It will not be thought that congress intended to give to the district and circuit courts jurisdiction over all causes both civil and criminal. They have expressly confined it to causes affecting certain persons. And yet, if all those who may be called as witnesses in a case, and who may be alleged to be important witnesses, were intended to be described in the class of per-

sons affected by it, and if the jurisdiction of the federal courts can be invoked by the assertion that there are persons who may be witnesses, but who, because of their race or color, are incompetent to testify in the courts of the state, there is no cause either civil or criminal of which those courts may not, at the option of either party, take jurisdiction. The statute of Kentucky which was in existence when this indictment was found, and which denied the right of Richard Foster and Laura Foster to testify in the courts of the state, enacted as follows: "That a slave, negro or Indian shall be a competent witness in the case of the commonwealth for or against a slave, negro or Indian, or in a civil case to which only negroes or Indians are parties, but in no other case." It will be observed that this statute prohibits the testimony of colored persons either for or against a white person in any civil or criminal cause to which he may be a party. If, therefore, they are persons affected by the cause, whenever they might be witnesses were they competent to testify, it follows that in any suit between white citizens, jurisdiction might be taken by the federal courts whenever it was alleged that a citizen of the African race was or might be an important witness. And such an allegation might always be made. So in all criminal prosecutions against white persons, a similar allegation would call into existence the like jurisdiction. We cannot think that such was the purpose of congress in the statute of April 9, 1866. It would seem rather to have been to afford protection to persons of the colored race by giving to the federal courts jurisdiction of cases, the decision of which might injuriously affect them either in their personal, relative or property rights, whenever they are denied in the state courts any of the rights mentioned and assured to them in the first section of the act.

Nor can it be said that such a construction allows little or no effect to the enactment. On the contrary, it concedes to it a far-reaching purpose. That purpose was to guard all the declared rights of colored persons, in all civil actions to which they may be parties in interest, by giving to the district and circuit courts of the United States jurisdiction of such actions whenever in the state courts any right enjoyed by white citizens is denied them. And in criminal prosecutions against them it extends a like protection. We cannot be expected to be ignorant of the condition of things which existed when the statute was enacted, or of the evils which it was intended to remedy. It is well known that in many of the states laws existed which subjected colored men convicted of criminal offenses to punishments different from and often severer than those which were inflicted upon white persons convicted of similar offenses. The modes of trial were also different, and the right of trial by jury was sometimes denied them. It is also well known that in many quarters prejudices existed against the colored race, which naturally affected the administration of justice in the state courts, and operated harshly when one of that race was a party accused. These were evils, doubtless, which the act of congress had in view and which it intended to remove. And so far as it reaches, it extends to both races the same rights and the same means of vindicating them. In view of these considerations, we are of opinion that the case now before us is not within the provisions of the act of April 9, 1866, and that the circuit court had not jurisdiction of the crime of murder committed in the district of Kentucky, merely because two persons who witnessed the murder were citizens of the African race, and for that reason incompetent by the law of Kentucky to testify in the courts of that state. They are not persons affected by the cause.

We need hardly add that the jurisdiction of the circuit court is not sustained

by the fact averred in the indictment that Lucy Armstrong, the person murdered, was a citizen of the African race, and for that reason denied the right to testify in the Kentucky courts. In no sense can she be said to be affected by the cause. Manifestly the act refers to persons in existence. She was the victim of the frightful outrage which gave rise to the cause, but she is beyond being affected by the cause itself.

§ 977. *United States v. Ortega examined and applied.*

The conclusions to which we have come are sustained, we think, fully by the judgment of this court in *United States v. Ortega*, 11 Wheat., 467, in which the opinion was delivered by Mr. Justice Washington. It was the case of an indictment in the circuit court for offering violence to the person of the Spanish minister, contrary to the law of nations and the act of congress. The second section of the third article of the constitution ordains that the judicial power of the United States shall extend to all cases affecting ambassadors, other public ministers and consuls, and that in all cases affecting ambassadors, other public ministers and consuls, the supreme court shall have original jurisdiction. The defendant was convicted, and, on motion in arrest of judgment, the question was presented to this court (and it was the only one decided), whether it was a case affecting an ambassador or other public minister. The court unanimously ruled that it was not. The violence out of which the indictment grew was committed upon a public minister, and he was a competent and material witness. But he was ruled to be not a person affected by the case, because it was a public prosecution instituted and conducted by and in the name of the United States, and for the purpose of vindicating the laws of nations and that of the United States, in the person of a public minister, offended by an assault committed on him by a private individual. It is, said the court, a case, then, which affects the United States and the individual whom they seek to punish; but one in which the minister himself, although he was the person injured by the assault, has no concern, either in the event of the prosecution, or in the costs attending it. What was meant by the phrase "a case affecting" was thus early defined, and we are bound to presume that congress, when they used the same word "affecting" in the act of 1866, intended to have it bear its defined meaning. This is according to a well-known rule of construction.

§ 978. "*Case*" and "*cause*" synonymous.

An attempt has, however, been made to discriminate between the words "case affecting," as found in the constitutional provision, and the words "cause affecting," contained in the act of congress. We are unable to perceive any substantial ground for a distinction. The words "case" and "cause" are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action. Surely no court can have jurisdiction of either a case or a cause until it is presented in the form of an action. We regard, therefore, *United States v. Ortega* as an authority directly in point to the effect that witnesses in a criminal prosecution are not persons affected by the cause. It necessarily results from this that jurisdiction of the offense for which these defendants were indicted was not conferred upon the circuit court by the act of congress. It is unnecessary, therefore, to consider the other questions presented by the record.

*Judgment reversed.*

Dissenting opinion by MR. JUSTICE BRADLEY, MR. JUSTICE SWAYNE concurring. I dissent from the opinion of the court in this case for the following reasons: The Civil Rights Bill (passed April 9, 1866, and under which the indictment

in this case was found and prosecuted) was primarily intended to carry out, in all its length and breadth, and to all its legitimate consequences, the then recent constitutional amendment abolishing slavery in the United States, and to place persons of African descent on an equality of rights and privileges with other citizens of the United States. To do this effectually it was not only necessary to declare this equality and impose penalties for its violation, but, as far as practicable, to counteract those unjust and discriminating laws of some of the states by which persons of African descent were subjected to punishments of peculiar harshness and ignominy, and deprived of rights and privileges enjoyed by white citizens.

§ 979. *The first section of the act of April 9, 1866, abrogates state laws that forbid a colored person to give evidence.*

This general scope and object of the act will often furnish us a clue to its just construction. It may be remarked, however, that the terms of the act are broad enough to embrace other persons as well as those of African descent, but that is a point not now in question in this case. The first section declares that all persons born in the United States, not subject to a foreign power, and not including untaxed Indians, are citizens of the United States, and that such citizens, of every race and color, without regard to previous condition of slavery, shall have the same right, in every state and territory in the United States, to make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law or custom to the contrary notwithstanding. This is the fundamental section of the act. All that follows is intended to secure and vindicate, to the objects of it, the rights herein declared, and to establish the requisite machinery for that end. This section is in direct conflict with those state laws which forbade a free colored person to remove to or pass through the state, from having firearms, from exercising the functions of a minister of the gospel, and from keeping a house of entertainment; laws which prohibited all colored persons from being taught to read and write, from holding or conveying property, and from being witnesses in any case where a white person was concerned; and laws which subjected them to cruel and ignominious punishments not imposed upon white persons, such as to be sold as vagrants, to be tied to the whipping-post, etc., etc. All these and all other discriminations were intended to be abolished and done away with.

§ 980. *The denial to colored persons, by a state, of a right to testify gives federal courts jurisdiction under the act of April 9, 1866.*

The second section makes it a misdemeanor, punishable by fine or imprisonment, for any person, under color of any law or custom, to deprive any inhabitant of a state or territory of any right secured by the act, or to subject him to different punishment or penalties on account of his having been a slave, or by reason of his color or race, than is prescribed for the punishment of white persons. The third section proceeds to confer upon the district courts of the United States, exclusive of the state courts, jurisdiction to try these offenses, and then follows the clause under which the indictment in the present case was found, declaring that the said district courts shall also have cognizance, concurrently with the circuit courts of the United States, "of all causes, civil and criminal, affecting persons who are denied, or cannot enforce in the courts or



judicial tribunals of the state or locality where they may be, any of the rights secured to them by the first section," with right of removal of causes from state courts, etc. It is evident that the provisions of the second section, making it a criminal offense to deprive a person of his rights, or to subject him to a discriminating punishment, would fail to reach a great number of cases which the broad and liberal provisions of the first section were intended to cover and protect. The clause in question is intended to reach these cases, or, at least, a large class of them. It provides a remedy where the state refuses to give one; where the mischief consists in inaction or refusal to act, or refusal to give requisite relief; whereas the second section provides for actual, positive invasion of rights. Thus, if the state should refuse to allow a freedman to sue in its courts, thereby denying him judicial relief, or should fail to provide laws for the punishment of white persons guilty of criminal acts against his person or property, thereby denying him judicial redress, there can be no doubt that the case would come within the scope of the clause under consideration. Suppose that, in any state, assault and battery, mayhem — nay, murder itself — could be perpetrated upon a colored man with impunity, no law being provided for punishing the offender, would not that be a case of denial of rights to the colored population of that state? Would not the clause of the Civil Rights Bill now under consideration give jurisdiction to the United States courts in such a case? Yet, if an indictment should be found in one of those courts against the offender, the technical parties to the record would only be the United States as plaintiff and the criminal as defendant. Nevertheless could it be said, with any truth or justice, that this would not be a cause affecting persons denied the rights secured to them by the first section of the law?

§ 981. *An indictment for murder of a colored person is a case "affecting" colored persons within the act of April 9, 1866.*

The case before us is just as clearly within the scope of the law as such a case would be. I do not put it upon the ground that the witnesses of the murder, or some of them, are colored persons, disqualified by the laws of Kentucky to testify, but on the ground that the cause is one affecting the person murdered, as well as the whole class of persons to which she belonged. Had the case been simple assault and battery, the injured party would have been deprived of a right, enjoyed by every white citizen, of entering a complaint before a magistrate, or the grand jury, and of appearing as a witness on the trial of the offender. I say "right," for it is a right, an inestimable right, that of invoking the penalties of the law upon those who criminally or feloniously attack our persons or our property. Civil society has deprived us of the natural right of avenging ourselves, but it has preserved to us, all the more jealously, the right of bringing the offender to justice. By the common law of England the injured party was the actual prosecutor of criminal offenses, although the proceeding was in the king's name; but in felonies, which involved a forfeiture to the crown of the criminal's property, it was also the duty of the crown officers to superintend the prosecution. And, although in this country it is almost the universal practice to appoint public and official prosecutors in criminal cases, yet it is the right of the injured party, and a duty he owes to society, to furnish what aid he can in bringing the offender to justice; and an important part of that right and duty consists in giving evidence against him.

To deprive a whole class of the community of this right, to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their

lives, their families and their property unprotected by law. It gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case. To say that actions or prosecutions intended for the redress of such outrages are not "causes affecting the persons" who are the victims of them, is to take, it seems to me, a view of the law too narrow, too technical, and too forgetful of the liberal objects it had in view. If, in such a raid as I have supposed, a colored person is merely wounded or maimed, but is still capable of making complaint, and, on appearing to do so, has the doors of justice shut in his face on the ground that he is a colored person, and cannot testify against a white citizen, it seems to me almost a stultification of the law to say that the case is not within its scope. Let us read it once more: "The district courts shall, concurrently with the circuit courts, have cognizance of all causes, civil and *criminal*, affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any of the rights secured to them by the first section of this act."

If the case above supposed is within the act (as it assuredly must be), does it cease to be so when the violence offered is so great as to deprive the victim of life? Such a construction would be a premium on murder. If mere violence offered to a colored person (who, by the law of Kentucky, was denied the privilege of complaint) gives the United States court jurisdiction, when such violence is short of being fatal, that jurisdiction cannot cease when death is the result. The reason for its existence is stronger than before. If it would have been a cause affecting him when living, it will be a cause affecting him though dead. The object of prosecution and punishment is to *prevent* crime, as well as to vindicate public justice. The fear of it, the anticipation of it, stands between the assassin and his victim like a vindictive shade. It arrests his arm, and loosens the dagger from his grasp. Should not the colored man have the ægis of this protection to guard his life, as well as to guard his limbs, or his property? Should he not enjoy it in equal degree with the white citizen? In a large and just sense, can a prosecution for his murder affect him any less than a prosecution for an assault upon him? He is interested in both alike. *They are his protection against violence and wrong.* At all events it cannot be denied that the entire class of persons under disability is affected by prosecutions for wrongs done to one of their number, in which they are not permitted to testify in the state courts.

I am well aware of the case of Ortega, who was indicted in the circuit court for offering violence to the person of the Spanish minister. The defendant claimed that it was "a case affecting a public minister," and under the constitution cognizable only in the supreme court. But the court, taking the strict and technical view, decided that, being a criminal case, in which the United States was plaintiff and the offender was defendant, they only were the parties whom the case *affected*. Conceding that this decision was good law for the purposes of that case, I do not feel that I am bound by it in this. The effect of that decision was, that the constitution, in giving the supreme court jurisdiction in cases affecting ambassadors, other public ministers and consuls only intended to give these public persons the right to *sue and be sued* in the supreme court. In the case before us, I think congress meant a great deal more than this when it gave the United States courts cognizance of all causes, civil and *criminal*, affecting persons who are denied, or cannot enforce in the courts of the state, any of the rights secured by the first section of the act.

I have considered the case irrespective of the fact that the witnesses of the transaction were all colored people, who, at the time this indictment was found, were denied the right to testify against white persons in Kentucky. I have placed it on the sole ground that prosecutions for crimes committed against colored persons are causes which, in the sense of the Civil Rights Bill, most seriously affect them; and that in Kentucky they were denied the privilege of being witnesses in these causes. I do not mean to be understood as saying that every cause in which a colored person may be called as a witness, for that reason belongs to the cognizance of the United States courts. In ordinary cases of a civil character, the party calling such a person as a witness is the person affected. Such party, be he black or white, may except to the rejection of his witness, and bring the case to this court by writ of error from the state court of last resort under the twenty-fifth section of the judiciary act. A defendant in a criminal prosecution may do the same thing where a bill of exceptions is allowed in criminal cases.

To conclude, I have no doubt of the power of congress to pass the law now under consideration. Slavery, when it existed, extended its influence in every direction, depressing and disfranchising the slave and his race in every possible way. Hence, in order to give full effect to the national will in abolishing slavery, it was necessary in some way to counteract these various disabilities and the effects flowing from them. Merely striking off the fetters of the slave, without removing the incidents and consequences of slavery, would hardly have been a boon to the colored race. Hence, also, the amendment abolishing slavery was supplemented by a clause giving congress power to enforce it by appropriate legislation. No law was necessary to abolish slavery; the amendment did that. The power to enforce the amendment by appropriate legislation must be a power to do away with the incidents and consequences of slavery, and to instate the freedman in the full enjoyment of that civil liberty and equality which the abolition of slavery meant.

In my opinion the judgment of the circuit court should be affirmed.

#### IN RE PARROTT.

(Circuit Court for California: 1 Federal Reporter, 481-531. 1890.)

Opinion by HOFFMAN, J.

STATEMENT OF FACTS.—The return in this case shows that the petitioner is imprisoned for an alleged violation of the act of the legislature of this state, approved February 13, 1880.

Article 19, section 2, of the recently adopted constitution of this state is as follows: "No corporation now existing, or hereafter formed under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as shall be necessary to enforce this provision."

In pursuance of this mandate the legislature enacted the law under which the petitioner has been arrested. It is as follows:

"AN ACT to amend the penal code by adding two new sections thereto, to be known as sections 178 and 179, prohibiting the employment of Chinese by corporations.

"*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

"Section 1. A new section is hereby added to the penal code, to be numbered section 178.

"Section 178. Any officer, director, manager, member, stockholder, clerk, agent, servant, attorney, employee, assignee or contractor of any corporation now existing or hereafter formed under the laws of this state, who shall employ, in any manner or capacity, upon any work or business of such corporation, any Chinese or Mongolian, is guilty of a misdemeanor, and is punishable by a fine of not less than \$100 nor more than \$1,000, or by imprisonment in the county jail of not less than fifty nor more than five hundred days, or by both such fine and imprisonment; *provided*, that no director of a corporation shall be deemed guilty under this section who refuses to assent to such employment, and has such dissent recorded in the minutes of the board of directors. 1. Every person who, having been convicted for violating the provisions of this section, commits any subsequent violation thereof after such conviction, is punishable as follows: 2. For each subsequent conviction such person shall be fined not less than \$500 nor more than \$5,000, or by imprisonment not less than two hundred days nor more than two years, or by both such fine and imprisonment.

"Section 2. A new section is hereby added to the penal code, to be known as section 179, to read as follows:

"Section 179. Any corporation now existing, or hereafter to be formed under the laws of this state, that shall employ, directly or indirectly, in any capacity, any Chinese or Mongolian, shall be guilty of a misdemeanor, and upon conviction thereof, shall, for the first offense, be fined not less than \$500 nor more than \$5,000; and, upon the second conviction, shall, in addition to said penalty, forfeit its charter and franchise, and all its corporate rights and privileges, and it shall be the duty of the attorney-general to take the necessary steps to enforce such forfeiture. This act shall take effect immediately."

It is claimed on behalf of the petitioner that this provision of the constitution, and the law passed in pursuance of it, are void because in violation of the fourteenth amendment of the constitution of the United States, and the law passed to enforce its provisions known as the Civil Rights Law; and also of the treaty between the United States and the Chinese empire, commonly called the Burlingame treaty. The fourteenth amendment enacts that "no state shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Civil Rights Bill provides that all persons within the jurisdiction of the United States shall have the same rights in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. R. S., 1977. Section 2164 provides that no tax or charge shall be imposed or enforced by any state upon any person immigrating thereto from a foreign country, which is not equally imposed and enforced upon every person immigrating thereto from a foreign country.

Article 5 of the Burlingame treaty recognizes "the mutual advantage of the free immigration and emigration of the citizens and subjects" (of the United States and of the emperor of China) "respectively, from the one country to the other for purposes of curiosity, or trade, or as permanent residents." Article 6 provides that "reciprocally, Chinese subjects visiting or *residing* in the United States shall enjoy the same privileges, immunities and exemptions,

in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."

§ 982. *Powers of the state over corporations under the constitution of California.*

It was not disputed by the attorney-general of California that these provisions of the treaty are within the treaty-making power of the United States, nor that the law under which the petitioner has been arrested, if in violation of those provisions, or those of the fourteenth amendment, or of the Civil Rights Bill, is void, anything in the constitution of the state to the contrary notwithstanding. But it is urged that the article of the constitution of this state which permits corporations to be formed under general laws reserves the right to repeal, alter or amend those laws at the discretion of the legislature; that their repeal would at once put an end to the corporate existence of the corporations, and that the right to put an end to their existence involves the right to prescribe the conditions upon which their existence shall be continued; that this right is theoretically and practically without limit, and may be exercised by imposing upon corporations laws for the conduct of their business, and restrictions upon the use and enjoyment of their property, which would be unconstitutional and void if applied to private persons, and which may have the effect to defeat the object of the association, or to impair or even destroy the beneficial use of its property. The state may, therefore, in the exercise of this reserved power, prescribe what persons may be employed by corporations organized under its laws, their number, their nationality, perhaps even their creed. It may determine what shall be their age or complexion, their height or their weight, the number of hours they shall work in a day, or the number of days in a week, and the rate of their wages. These illustrations may seem extravagant, but they were all either recognized by counsel as within the scope of the reserved power, or else they are legitimate examples of the mode in which the reserved power, as claimed, might be exercised. For all such legislation the only remedy of the corporations is to disincorporate and cease to exist.

Such being the reserved power of the state over the creatures of its laws, it is urged that the treaty was not intended, and cannot be construed, to impair that right any more than it could be deemed to abridge the right to enact laws in the interest of the public health, safety or morals, usually known as police laws, or to regulate the making of contracts by providing who shall be incompetent to make them, as infants, married women, and the like. When we consider the vast number of corporations which have been formed under the laws of this state, the claim thus put forth is well fitted to startle and alarm. It amounts in effect to a declaration that the corporations formed under the laws of this state, and their stockholders, hold their property, so far as its beneficial use and enjoyment are concerned, at the mercy of the legislature, and that rights which in the case of private individuals would be inviolable, have for them no existence.

§ 983. *Reserved power over corporations. Cases cited.*

The circumstances which led to the insertion in charters of incorporation of the reservation in question are well known. The supreme court having decided that a charter of a literary institution was a contract, and therefore protected by the provision in the constitution which forbids the states to make any law impairing the obligation of contracts, the reservation clause was introduced in order to withdraw the contract from the operation of the constitu-

tional inhibition, and to retain to the authority which created the corporation the right to resume the granted powers, or to modify them, as the public interests might require. It may confidently be affirmed that it was not intended to authorize the exercise of the unrestrained power over the operations of corporations, and the use of their property, contended for at the bar.

The adjudged cases, though they contain no precise definition of the extent and limits of this power applicable to all questions which may arise, are nevertheless full of instruction on the subject. In *Sinking Fund Cases*, 9 Otto, 720 (CORPORATIONS, §§ 1624-69), Mr. Chief Justice Waite, delivering the opinion of the court, says: "That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in *Miller v. State*, 15 Wall., 498 (§§ 2127-32, *infra*), 'it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs so as to protect the rights of stockholders and of creditors, and for the proper disposition of the assets;' and again, in *Holyoke Co. v. Lyman*, id., 519 (§§ 2170-76, *infra*), 'to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of a corporation.' Mr. Justice Field, also speaking for the court, was even more explicit when, in *Tomlinson v. Jessup*, id., 459 (§ 2316, *infra*), he said, 'the reservation affects the entire relation between the state and the corporation, and places under legislative control all *rights, privileges and immunities* derived by its charter directly from the state.' And again, as late as *Railroad Co. v. Maine*, 96 U. S., 510, 'by the reservation the state retained the power to alter it (the charter) in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges and immunities.' Mr. Justice Swayne, in *Shields v. Ohio*, 95 U. S., 324, says, by way of limitation: 'The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.'"

§ 984. — *the extent of the operation of the reservation of power over corporations.*

In his dissenting opinion in this case, Mr. Justice Field reproduces and explains the language used by him in *Tomlinson v. Jessup* and *Railroad Co. v. Maine*. He says: "The object of a reservation of this kind, in acts of incorporation, is to insure to government control over corporate franchises, rights and privileges which, in its sovereign or legislative capacity, it may call into existence, not to interfere with contracts which the corporation created by it may make. Such is the purport of our language in *Tomlinson v. Jessup*, where we state the object of the reservation to be 'to prevent a grant of *corporate* rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference;' and 'that the reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities *derived by its charter directly from the state.*' 5 Wall., 354. The same thing we repeated, with greater distinctness, in *Railroad Co. v. Maine*, where we said that 'by the reservation the state retained the power to alter the act incorporating the company in all particulars *constituting the*

*grant to it of corporate rights, privileges and immunities;*’ and that ‘the existence of the corporation and its franchises and immunities, derived directly from the state, were thus kept under its control.’ But we added, ‘that the rights and interests acquired by the company, *not constituting a part of the contract of incorporation, stand upon a different footing.*’ 96 U. S., 499.” (The *italics* are the learned justice’s own.)

In *Commonwealth v. Essex Co.*, 13 Gray (Mass.), 239–253, Mr. Justice Shaw says: “It seems to us that this power must have some limit, though it is difficult to define it. . . . Perhaps from these extreme cases—for extreme cases are allowable to test a legal principle—the rule to be extracted is this: that where, under a power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property *or rights* which have become vested under a legitimate exercise of the powers granted.” Page 253. “This rule,” says Mr. Justice Strong, “has been recognized ever since.” 99 U. S., 700–742. The language of Mr. Justice Story in the *Dartmouth College Case*, which, as before remarked, first led to the general insertion of the reservation clause in charters of incorporation, clearly indicates its object. “When,” he observes, “a private corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown than what is expressly or impliedly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to them, or add to or diminish the number of the trustees, or remove any of the members, or change or control the administration of the funds, or compel the corporation to receive a new charter.” 4 Wheat., 675 (§§ 2099–2117, *infra*).

“Probably,” Mr. Justice Bradley observes, “in view of this somewhat unexpected application of the clause” (forbidding the states to impair the obligation of contracts), “operating as it did to deprive the states of nearly all legislative control over corporations of their own creation, the courts have given liberal construction to the reservation of power to alter, amend and repeal a charter, and have sustained some acts of legislation made under such a reservation which are at least questionable.” 99 U. S., 748. In *Miller v. State*, 15 Wall., 498 (§§ 2127–32, *infra*), the supreme court says: “Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such charter, and which, by a legitimate use of the powers granted, have become vested in the corporation; but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets. Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use, inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract.” *State v. Adams*, 44 Mo., 570; *Zabriskie v. Railroad Co.*, 3 C. E. Green, 178–180; *Sage v. Dillard*, 15 B. Mon., 340–359. These citations sufficiently indicate the nature, object, and, to a certain degree, the extent of the powers reserved in the clause in question; and, although they do not define their limits in every direction,

they lay down certain *ne plus ultra* boundaries, which the legislature may not pass. Over all the rights, privileges and immunities conferred by the charter upon the corporation, and which are derived from the charter, the legislature has control. But, in the language of the supreme court, "the rights and interests acquired by the company, and not constituting a part of the contract of corporation, stand upon a different footing." 96 U. S., 571.

§ 985. *Rights that may be acquired by a corporation which are inviolable.*

The right to use a corporate name and seal, the right, under that name, to sue and be sued, to acquire property and to contract, are rights which owe their existence to the charter. But when a contract has been made, or property acquired, by a lawful exercise of the granted powers, the contract is as inviolable, and the right of property, with everything incidental to that right, as sacred, as in the case of natural persons. It is not merely the title to the property that is protected from legislative confiscation, but that which gives value to all property,—the right to its lawful use and enjoyment. It would be a "mockery, a delusion, and a snare" to say to a corporation: "The title to the property you have lawfully acquired we may not disturb, but we may prescribe such conditions as to its use as will utterly destroy its beneficial value." It need hardly be said that no reference is here intended to the power of the state to enact police laws—that is, laws to promote the health, safety or morals of the public. To such laws corporations are amenable to the same extent as natural persons and no further.

The law in question does not affect to be a police law. Its validity, if applied to natural persons, was not contended for at the bar. The authority to pass it was sought to be derived exclusively from the reserved power over corporations. It forbids the employment of Chinese. If the power to pass it exists, it might equally well have forbidden the employment of Irish, or Germans, or Americans, or persons of color, or it might have required the employment of any of these classes of persons to the exclusion of the rest. It might, as avowed at the bar, have prescribed a rate of wages, hours of work, or other conditions destructive of the profitable use of the corporate property. Such an exercise of legislative power can only be maintained on the ground that stockholders of corporations have no rights which the legislature is bound to respect. Behind the artificial or ideal being created by the statute and called a corporation, are the corporators—natural persons who have conveyed their property to the corporation, or contributed to it their money, and received, as evidence of their interest, shares in its capital stock. The corporation, though it holds the title, is the trustee, agent and representative of the shareholders, who are the real owners. And it seems to me that their right to use and enjoy their property is as secure under constitutional guaranties as are the rights of private persons to the property they may own. That the law in question substantially, and not merely theoretically, violates the constitutional rights of the owners of corporate property, can readily be shown. Already several corporations representing investments of great magnitude, submitting to its commands, have ceased their operations. It is probable that, if the law be declared valid, many more will be forced to follow their example. It applies to all corporations formed under the laws of this state. If its provisions be enforced, a bank or a railroad company will lose the right to employ a Chinese interpreter to enable it to communicate with Chinese with whom it does business. A hospital association would be unable to employ a Chinese servant to make known or minister to the wants of a Chinese patient; and even a society for the conversion of the



heathen would not be allowed to employ a Chinese convert to interpret the gospel to Chinese neophytes.

§ 986. *Alterations in a charter must be reasonable and consistent with the object of the corporation.*

The language of the supreme court in *Shields v. Ohio*, 95 U. S., 324, has already been quoted: "The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. . . . Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration."

§ 987. — *and a law prohibiting the corporation to employ the natives of any country has no connection with that object, and is therefore unwarranted.*

Can it be pretended that this law, of the effect of which I have given these examples, is reasonable as between the state and the corporations, without regard to the treaty rights of Chinese residents. Can it be said to be in good faith — that is, in the fair and just exercise of the reserved power to regulate corporations for the protection of the stockholders, their creditors, and the general public? Is it not rather an attempt, "under the guise of amendment or alteration," to attain quite a different, and, as I shall presently show, an unconstitutional object, viz.: To drive the Chinese from the state by preventing them from laboring for their livelihood? I apprehend that, to these questions, but one candid answer can be given. I am, therefore, of opinion that irrespective of the rights secured to the Chinese by the treaty, the law is void, as not being a "reasonable," *bona fide*, or constitutional exercise of the power to alter and amend the general laws under which corporations in this state have been formed; that it would be equally invalid if the proscribed class had been Irish, Germans or Americans; that the corporations have a constitutional right to utilize their property by employing such laborers as they choose, and on such wages as may be mutually agreed upon; that they are not compelled to shelter themselves behind the treaty right of the Chinese, to reside here, to labor for their living and accept employment when offered; but they may stand firmly on their own right to employ laborers of their choosing and on such terms as may be agreed upon, subject only to such police laws as the state may enact with respect to them, in common with private individuals.

§ 988. *Quære, as to the effect of the repeal of general corporation laws upon corporations already formed.*

In the foregoing observations I have treated the question discussed as if the reservation had been found in a special charter, by which the corporation was created, and its franchises conferred. I have endeavored to show that such a reservation cannot be construed to authorize the legislature to impair the obligation of any contract lawfully made by a corporation, or to deprive the corporation of any vested property or rights of property lawfully acquired. But in this state the constitution forbids the legislature to create private corporations by special act. They may be "formed" (i. e., by private persons) "under general laws." All persons who choose to avail themselves of the provisions of these laws may acquire the franchises which they offer. These general laws may be repealed or altered. What would be the effect upon the existence or rights of corporations already formed, of the repeal or alteration of these laws, it is not necessary here to inquire.

§ 989. *A general reservation of power over corporations is no more effective than a reservation in a special charter.*

It is sufficient to say that the legislative power cannot be greater under such

a provision than under a reservation of a power to amend or repeal contained in a charter by which a corporation is *created* and its franchises conferred.

2. But, even if the reserved power of the state over corporations were as extensive as is claimed, its exercise in the manner attempted in this case would be invalid, because in conflict with the treaty.

§ 990. *A treaty is part of the supreme law of the land.*

"In every such case" (where the federal government has acted) "the act of congress or the treaty is supreme, and the law of the state, *though enacted in the exercise of power not controverted*, must yield to it." Per Mr. C. J. Marshall, in *Gibbons v. Ogden*, 9 Wheat., 211 (§§ 1183-1201, *infra*). The principle thus enunciated by the great chief justice has never since been disputed. *Henderson v. Mayor of New York*, 92 U. S., 272 (§§ 1336-42, *infra*); *Railroad Co. v. Husen*, 95 U. S., 465 (§§ 1062-65, *infra*).

§ 991. *The constitutional provision in question.*

The article of the constitution of this state under which the law under consideration was enacted is as follows:

## "ARTICLE XIX.

### "CHINESE.

"Section 1. The legislature shall prescribe all necessary regulations for the protection of the state, and the counties, cities and towns thereof, from the burdens and evils arising from the presence of aliens who are or *may become* vagrants, paupers, mendicants, criminals or invalids, afflicted with contagious or infectious diseases, and from aliens otherwise dangerous or detrimental to the *well-being or peace* of the state, and to impose conditions upon which such persons may reside in the state, and to provide the means and mode of their removal from the state upon failure or refusal to comply with such conditions; *provided*, that nothing contained in this section shall be construed to impair or limit the power of the legislature to pass such police laws or other regulations as it may deem necessary.

"Sec. 2. No corporation now existing, or hereafter formed, under the laws of this state, shall, after the adoption of this constitution, employ, *directly or indirectly*, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as may be necessary to enforce this provision.

"Sec. 3. No Chinese shall be employed on any state, county, municipal or other public work, except in punishment for crime.

"Sec. 4. The presence of foreigners ineligible to become citizens is declared to be dangerous to the well-being of this state, and the legislature shall discourage their immigration by all the means within its power. . . ."

The end proposed to be attained by this extraordinary article is clearly and even ostentatiously avowed. Its title proclaims that it is directed against the Chinese. It forbids their employment by any but private individuals, and when through the operation of the laws they shall have become, or be liable to become, vagrants, paupers, mendicants or criminals, the legislature is directed to provide for their removal from the state if they fail to comply with such conditions as it may prescribe for their continued residence. The framers of the article do not seem to have relied upon the efficacy of the provisions imposing such extensive restrictions upon the rights of the proscribed race to labor for their living, to reduce them to the condition of vagrants, paupers, mendicants or criminals, or persons who "may become" such. The legislature is

directed to impose conditions of residence, and provide for the removal of "*aliens otherwise dangerous or detrimental to the well-being or peace of the state,*" and lest any doubt or hesitation should be felt as to the propriety of including wealthy and respectable Chinese in this class, the fourth section declares "the presence of foreigners ineligible to become citizens of the United States" (*i. e.*, the Chinese) to be "dangerous to the well-being of the state." And the legislature is directed to "discourage their immigration by all the means within its power."

Would it be believed possible, if the fact did not so sternly confront us, that such legislation as this could be directed against a race whose right freely to emigrate to this country, and reside here with all "the privileges, immunities and exemptions of the most favored nation," has been recognized and guaranteed by a solemn treaty of the United States, which not only engages the honor of the national government, but is by the very terms of the constitution the supreme law of the land?

§ 992. *Rule for construing statutes in determining their constitutionality.*

The legislature has not yet attempted to carry into effect the mandate of the first section by imposing conditions upon which aliens who are or may become vagrants, paupers, mendicants or criminals may reside in the state, or by providing for their removal. Its action thus far has been limited to forbidding the employment of Chinese, directly or indirectly, by any corporation formed under the laws of this state. The validity of this law is the only question presented for determination in the present case. In considering the question we are at liberty to look not merely to the language of the law, but to its effect and purpose. "In whatever language a statute may be framed, its purpose may be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases." *Henderson v. The Mayor, etc.*, 92 U. S., 268 (§§ 1336-42, *infra*). "If, as we have endeavored to show in the opinion in the preceding cases, we are at liberty to look to the effect of a statute for the test of its constitutionality, the argument need go no further." *Chy Lung v. Freeman*, 92 U. S., 279 (§§ 1343-44, *infra*).

§ 993. *The fact that an act is passed in pursuance of the police power of the state does not save it if it contravene the constitution or treaties of the United States.*

If the effect and purpose of the law be to accomplish an unconstitutional object, the fact that it is passed in the pretended exercise of the police power, or a power to regulate corporations, will not save it. If a law of the state forbidding the Chinese to labor for a living, or requiring them to obtain a license for doing so, would have been plainly in violation of the constitution and treaty, the state cannot attain the same end by addressing its prohibition to corporations. In *Cummings v. State of Missouri*, Mr. Justice Field, speaking for the court, observes: "Now, as the state, had she attempted the course supposed, would have failed, it must follow that any other mode of producing the same result must equally fail. The provisions of the federal constitution intended to secure the liberty of the citizen cannot be evaded by the form in which the power of the state is exerted. If this were not so — if that which cannot be

accomplished by means looking directly to the end can be accomplished by indirect means — the inhibition may be evaded at pleasure. No kind of oppression can be named, against which the framers of the constitution intended to guard, which may not be effected.” 4 Wall., 320 (§§ 608–618, *supra*).

§ 994. *A state constitutional provision, and laws passed in pursuance thereof, to restrict the rights of Chinese, is in conflict with the treaty with China and void.*

The application of these pregnant words to the case at bar is obvious. Few will have the hardihood to deny the purpose and effect of the article of the constitution which has been cited. It is in open and seemingly contemptuous violation of the provisions of the treaty which give to the Chinese the right to reside here with all the privileges, immunities and exemptions of the most favored nation. It is in fact but one, and the latest, of a series of enactments designed to accomplish the same end. The attempt to impose a special license tax upon Chinese for the privilege of mining, the attempt to subject them to peculiar and exceptional punishments commonly known as the Queue ordinance, have been frustrated by the judgments of this court. The attempt to extort a bond from ship-owners as a condition of being permitted to land those whom a commissioner of immigration might choose to consider as coming within certain enumerated classes, has received the emphatic and indignant condemnation of the supreme court. *Chy Lung v. Freeman*, 92 U. S., 275 (§§ 1343–44, *infra*). But the question which now concerns us is: Does the law under consideration impair or destroy the treaty rights of Chinese residents? For it may be a part of a system obviously designed to effect that purpose, and yet not of itself be productive of that result. Its practical operation and effect must, therefore, be adverted to.

The advantages of combining capital and restricting individual liability, by the formation of corporations, have, from the organization of this state, been recognized by its laws. That method, now universal throughout the civilized world in the prosecution of great enterprises, has in this state received an unprecedented development. Its laws permit the formation of corporations for any purpose for which individuals may lawfully associate and the corporations already formed cover almost every field of human activity. The number of certificates on file in the clerk's office of this county alone was stated at the hearing to be eight thousand three hundred and ninety-seven. The number in the entire state is of course far greater. They represent a very large proportion of the capital and industry of the state.

§ 995. *The right to labor for a living is one of the privileges extended by the Burlingame treaty to Chinese.*

The employment of Chinese, directly or indirectly, in any capacity, by any of these corporations, is prohibited by the law. No enumeration would, I think, be attempted of the privileges, immunities and exemptions of the most favored nation, or even of man in civilized society, which would exclude the right to labor for a living. It is as inviolable as the right of property, for property is the offspring of labor. It is as sacred as the right to life, for life is taken if the means whereby we live be taken. Had the labor of the Irish or Germans been similarly proscribed, the legislation would have encountered a storm of just indignation. The right of persons of those or other nationalities to support themselves by their labor stands on no other or higher ground than that of the Chinese. The latter have even the additional advantage afforded by the express and solemn pledge of the nation.

That the unrestricted immigration of the Chinese to this country is a great

and growing evil; that it presses with much severity on the laboring classes, and that, if allowed to continue in numbers bearing any considerable proportion to that of the teeming population of the Chinese empire, it will be a menace to our peace and even to our civilization, is an opinion entertained by most thoughtful persons. The demand, therefore, that the treaty shall be rescinded or modified is reasonable and legitimate. But while that treaty exists the Chinese have the same rights of immigration and residence as are possessed by any other foreigners. Those rights it is the duty of the courts to maintain, and of the government to enforce. The declaration that "the Chinese must go, peaceably or forcibly," is an insolent contempt of national obligations and an audacious defiance of national authority. Before it can be carried into effect by force the authority of the United States must first be not only defied, but resisted and overcome. The attempt to effect this object by violence will be crushed by the power of the government. The attempt to attain the same object indirectly by legislation will be met with equal firmness by the courts; no matter whether it assumes the guise of an exercise of the police power, or of the power to regulate corporations, or of any other power reserved by the state; and no matter whether it takes the form of a constitutional provision, legislative enactment, or municipal ordinance.

I have considered this case at much greater length than the difficulty of the questions involved required. But I have thought that their great importance, and the temper of the public with regard to them, demanded that no pains should be spared to demonstrate the utter invalidity of this law.

Opinion by SAWYER, J.

STATEMENT OF FACTS.—The constitution of California, adopted in 1879, provides that "no corporation now existing, or hereafter formed, under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolian. The legislature shall pass such laws as may be necessary to enforce this provision." Article 19, § 2. In obedience to this mandate of the constitution the legislature, on February 13, 1880, passed an act entitled "An act to amend the penal code by adding two new sections thereto, to be known as sections 178 and 179, prohibiting the employment of Chinese by corporations," the first section of which statute reads as follows:

"Section 1. A new section is hereby added to the penal code, to be numbered section 178:

"Section 178. Any officer, director, manager, member, stockholder, clerk, agent, servant, attorney, employee, assignee or contractor of any corporation now existing or hereafter formed, under the laws of this state, who shall employ, in any manner or capacity, upon any work or business of such corporation, any Chinese or Mongolian, is guilty of a misdemeanor, and is punishable by a fine of not less than \$100 nor more than \$1,000, or by imprisonment in the county jail of not less than fifty nor more than five hundred days, or by both such fine and imprisonment; *provided*, that no director of a corporation shall be deemed guilty, under this section, who refuses to assent to such employment, and has such dissent recorded in the minutes of the board of directors. 1. Every person who, having been convicted for violating the provisions of this section, commits any subsequent violation thereof after such conviction, is punishable as follows: 2. For each subsequent conviction, such person shall be fined not less than \$500 nor more than \$5,000, or by imprisonment not less

than two hundred and fifty days nor more than two years, or by both such fine and imprisonment."

The petitioner is president and director of the Sulphur Bank Quicksilver Mining Company, a corporation organized under the laws of California before the adoption of the present constitution, but still doing business within the state. Having been arrested and held to answer before the proper state court, upon a complaint duly made, setting out in due form the offense of employing in the business of said corporation certain Chinese citizens of the Mongolian race, created by said act, he sued out a writ of *habeas corpus*, which, having been returned, he asks to be discharged, on the ground that said provisions of the constitution, and act passed in pursuance thereof, are void, as being adopted and passed in violation of the provisions of the treaty of the United States with the Chinese empire, commonly called the "Burlingame Treaty," and of the fourteenth amendment to the constitution of the United States, and of the acts of congress passed to give effect to said amendment. The question in this case, therefore, is as to the validity of said constitutional provision and said act. Article 1, section 10, of the constitution of the United States, provides that "no state shall enter into any treaty, alliance or confederation." Article 2, section 2, that the president "shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present shall concur;" and article 6, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and *all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.*"

§ 996. *Treaty-making power surrendered by the states to the general government. Supremacy of treaties over state constitutions and laws.*

There can be no mistaking the significance or effect of these plain, concise, emphatic provisions. The states have surrendered the treaty-making power to the general government, and vested it in the president and senate; and, when duly exercised by the president and senate, the treaty resulting is the *supreme law* of the land, to which not only state laws but *state constitutions* are in express terms subordinated. Soon after the adoption of this constitution the supreme court of the United States had occasion to consider this provision, making treaties the supreme law of the land, in *Ware v. Hylton*, and Mr. Justice Chase, speaking of its effects, said: "A treaty cannot be the supreme law of the land—that is, of all the United States—if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state, and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only by repeal, or nullification by a state legislature, this certain consequence follows: that the will of a small part of the United States may control or defeat the will of the whole." 3 Dal., 236. Again: "It is the declared duty of the *state judges* to determine any constitution or laws of any state contrary to that treaty, or *any other* made under the authority of the United States, null and void. *National or federal judges are bound by duty*

*and oath to the same conduct.*" Id., 237. And again: "It is asked, did the fourth article intend to annul a law of the state, and destroy rights under it? I answer, that the fourth article did intend to destroy all lawful impediments, past and future; and that the law of Virginia, and the payment under it, is a lawful impediment, and would bar a recovery if not destroyed by this article of the treaty. . . . I have already proved that a treaty can totally annihilate any part of the constitution of any of the individual states that is contrary to a treaty." Id., 242-3.

§ 997. *Authorities reviewed.*

The case of *Hauenstein v. Lynham*, being an action by citizens and residents of Switzerland, heirs of an alien who died in Virginia, leaving property which had been adjudged to have escheated to the state, to recover the proceeds of said property, was decided at the present term of the United States supreme court on writ of error to the court of appeals of the state of Virginia. The courts of Virginia had held that, under the laws of Virginia, the proceeds of the property sought to be recovered belonged to the state; but the judgment was reversed by the supreme court of the United States, on the ground that the laws of Virginia were in conflict with a treaty of the United States with the Swiss Confederation. After construing the treaty, the court says: "It remains to consider the effect of the treaty thus construed upon the rights of the parties. That the laws of the state, irrespective of the treaty, would put the fund into her coffers, is no objection to the right or the remedy claimed by the plaintiffs in error. The efficacy of the treaty is declared and guaranteed by the constitution of the United States."

The court cites and comments upon *Ware v. Hylton*, *supra*, and then proceeds: "In *Chirac v. Chirac*, 2 Wheat., 259, it was held by this court that a treaty with France gave to the citizens of that country the right to purchase and hold land in the United States, and that it removed the incapacity of alienage, and placed the parties in precisely the same situation as if they had been citizens of this country. The state law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal v. Banks*, 10 Wheat., 189, and with respect to the British treaty of 1794 in *Hughes v. Edwards*, 9 Wheat., 489. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by *escheat* under the laws of a state. *Orr v. Hodgson*, 4 Wheat., 453. Mr. Calhoun, after laying down certain exceptions and qualifications, which do not affect this class of cases, says: 'Within these limits, all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power, and may be adjusted by it.' *Treat. on the Constitution and Government of the United States*, 204. If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the states are expressly forbidden to enter into any treaty, alliance or confederation. Const., art. 1, sec. 10. It must always be borne in mind that the constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. See, also, *Shanks v. Dupont*, 3 Pet., 242; *Foster v. Neilson*, 2 id., 314; *The Cherokee Tobacco*, 11 Wall., 616; *Mr. Pinkney's Speech*, 3 El. of the U. S., 281; *People v. Gerke*, 5 Cal., 381. We have no doubt that this treaty is within the treaty-making power conferred by the constitution; and it is our duty to give it full effect." *The Reporter*, vol. 9, p. 268.

§ 998. *The treaty between China and the United States recited.*

If, therefore, the constitutional provision, and the statute in question, made in pursuance of its mandate, are in conflict with a valid treaty with China, they are void. The treaty between the United States and China, of July 28, 1868, contains the following provisions: "Article 5. The United States and the emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as *permanent residents*."

"Article 6. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions, in respect to travel *or residence*, as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions, in respect to travel *or residence*, as may there be enjoyed by the citizens or subjects of the most favored nation." 16 St., 740.

§ 999. *Rights of Chinese under the treaty to change their domicile with a view to permanent residence in the United States.*

Thus the right of the Chinese to change their homes, and to freely emigrate to the United States for the purpose of *permanent residence*, is, in express terms, recognized; and the next article in express terms stipulates that Chinese residing in the United States shall enjoy the same privileges, immunities and exemptions, in respect to residence, as may there be enjoyed by the citizens and subjects of the most favored nation. The words "privileges and immunities," as used in the constitution in relation to rights of citizens of the different states, have been fully considered by the supreme court of the United States, and generally defined, and there can be no doubt that the definitions given are equally applicable to the same words as used in the treaty with China.

§ 1000. *What is embraced in the term "privileges."*

In the Slaughter-House Cases, 16 Wall., 36 (§§ 752-801, *supra*), the supreme court approvingly cites and re-affirms from the opinion of Mr. Justice Washington, in *Corfield v. Coryell*, the following passage: "The inquiry is, what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental*; which belong to the rights of citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." The court then adds: "The description, when taken to include others not named, but which are of the same general character, *embraces nearly every civil right for the establishment and protection of which organized government is established.*" 16 Wall., 76. And in *Ward v. Maryland*, the same court observes: "Beyond doubt these words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmis-



takably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business without molestation; to acquire personal property; to take and hold real estate," etc. 12 Wall., 430 (§§ 825-828, *supra*). So, in the Slaughter-House Cases, Mr. Justice Field remarks upon these terms: "The privileges and immunities designated are those which of right belong to citizens of all free governments. Clearly among these must be placed *the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.*" 16 Wall., 97 (§§ 752-801, *supra*). Mr. Justice Bradley, in discussing the question as to what is embraced in the "privileges and immunities" secured to the citizens, among other equally pointed and emphatic declarations, says: "In my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of *his most valuable rights, and one which the legislature of a state cannot invade, whether restrained by its own constitution or not.*" Id., 113, 114. He also enumerates, as among the fundamental rights embraced in the privileges and immunities of a citizen, all the absolute rights of individuals classed by Blackstone under the three heads, "The right of personal security; the right of personal liberty; and the right of private property" (id., 115); and in relation to these rights says: "In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, *does deprive them of liberty, as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.*" Id., 122. And Mr. Justice Swayne supports this view in the following eloquent and emphatic language: "Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. *Labor is property, and, as such, merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property.*" Id., 127.

Some of these extracts are from the dissenting opinions, but not upon points where there is any disagreement. There is no difference of opinion as to the significance of the terms "privileges and immunities." Indeed, it seems quite impossible that any definition of these terms could be adopted, or even seriously proposed, so narrow as to exclude the right to labor for subsistence. As to by far the greater portion of the Chinese, as well as other foreigners who land upon our shores, their labor is the only exchangeable commodity they possess. To deprive them of the right to labor is to consign them to starvation. The right to labor is, of all others, after the right to live, the fundamental, inalienable right of man, wherever he may be permitted to be, of which he cannot be deprived, either under the guise of law or otherwise, except by usurpation and force. Man ate and died. When God drove him "forth from the Garden of Eden to till the ground, from whence he was taken," and said to him, "in the sweat of thy face shalt thou eat bread, till thou return unto the ground," He invested him with an inalienable right to labor in order that he might again eat and live. And this absolute, fundamental and natural right

was guarantied by the national government to all Chinese who were permitted to come into the United States, under the treaty with their government, "for the purposes of curiosity, of trade, or as permanent residents," to the same extent as it is enjoyed by citizens of the most favored nation. It is one of the "privileges and immunities" which it was stipulated that they should enjoy in that clause of the treaty which says: "Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation." And any legislation or constitutional provision of the state of California which limits or restricts that right to labor to any extent, or in any manner, not applicable to citizens of other foreign nations visiting or residing in California, is in conflict with this provision of the treaty; and such are the express provisions of the constitution and statute in question.

The same view of the effect of the treaty was taken in *Baker v. City of Portland*, by Judge Deady, of the district of Oregon, and concurred in by Mr. Justice Field on application for rehearing. 5 Saw., 566, 572; 3 Pacific Coast Law Journal, 469. I should not have deemed it necessary to cite so fully the opinions of others on a proposition so plain to my mind, but for the gravity of the question, and the fact that the people of California and their representatives in the legislature have incorporated in the constitution of the state, and in legislation had in pursuance of the constitutional mandate, after full discussion, provisions utterly at variance with the views expressed. Under such circumstances I feel called upon to largely cite the thoroughly considered and authoritative views of those distinguished jurists upon whom will devolve the duty of ultimately determining the points in controversy.

§ 1001. *Residence in a country of aliens is within the scope of the treaty-making power and may be controlled and limited by treaty.*

As to the point whether the provision in question is within the treaty-making power, I have as little doubt as upon the point already discussed. Among all civilized nations, in modern times at least, the treaty-making power has been accustomed to determine the terms and conditions upon which the subjects of the parties to the treaty shall reside in the respective countries, and the treaty-making power is conferred by the constitution in unlimited terms. Besides, the authorities cited on the first point fully cover and determine this question. If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain. If it has authority to stipulate that aliens residing in a state may acquire and hold property, and on their death transmit it to alien heirs who do not reside in the state, against the provisions of the laws of the state, otherwise valid—and so the authorities already cited hold,—then it certainly must be competent for the treaty-making power to stipulate that aliens residing in a state in pursuance of the treaty may labor in order that they may live and acquire property that may be so held, enjoyed, and thus transmitted to alien heirs. The former must include the latter—the principal, the incidental power. See, also, *Holden v. Joy*, 17 Wall., 242–3; *United States v. Forty-seven Gallons of Whisky*, 3 Otto, 196–8. But the provisions in question are also in conflict with the fourteenth amendment of the national constitution, and with the statute passed to give effect to its provisions. The fourteenth amendment, among other things, provides that "no state shall make or enforce any law

which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1977 of the Revised Statutes, passed to give effect to this amendment, provides that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

§ 1002. *Citizenship not necessary to entitle a person to "equal protection of the laws," under the fourteenth amendment.*

It will be seen that in the latter clause the words are "any person," and not "any citizen," and prevents any state from depriving "any person" of life, liberty or property without due process of law, or from denying to "any person" within its jurisdiction the equal protection of the law. In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the constitution; and, in consonance with these provisions, the statute enacts that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Chinese residing in California, in pursuance of the treaty stipulations, are persons within the jurisdiction of the state," and "of the United States," and therefore within the protection of these provisions. *And contracts to labor, such as all others make, are contracts which they have a "right to make and enforce," and the laws under which others' rights are protected are the laws to which they are entitled to the "equal benefit," as is enjoyed by white citizens.*

§ 1003. — *and a denial of the right to labor to Chinese, specially, is a denial of "equal protection of the laws."*

It would seem that no argument should be required to show that the Chinese do not enjoy the equal benefit of the laws with citizens, or "the equal protection of the laws," where the laws forbid their laboring, or making and enforcing contracts to labor, in a very large field of labor which is open, without limit, let or hindrance, to all citizens, and all other foreigners, without regard to nation, race or color. Yet, in the face of these plain provisions of the national constitution and statutes, we find, both in the constitution and laws of a great state and member of this Union, just such prohibitory provisions and enactments discriminating against the Chinese. Argument and authority, therefore, seem still to be necessary, and fortunately we are not without either. From the citations already made, and from many more that might be made from Justices Field, Bradley, Swayne and other judges, it appears that to deprive a man of the right to select and follow any lawful occupation—that is, to labor, or contract to labor, if he so desires, and can find employment—is to deprive him of both liberty and property, within the meaning of the fourteenth amendment and the act of congress.

Says Mr. Justice Bradley: "For the preservation, exercise and enjoyment

of these rights, the individual citizen, as a necessity, must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, *when chosen, is a man's property and right. Liberty and property are not protected where those rights are arbitrarily assailed.*" 16 Wall., 116 (§§ 725-801, *supra*). Whatever may be said as to this clause of the amendment, there can be no doubt as to the effect of the act. With respect to the last clause, Mr. Justice Bradley says of a law which interferes with a man's right to choose and follow an occupation: "*Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.*" Id., 122. And Mr. Justice Swayne: "*The equal protection of the laws places all upon an equal footing of legal equality, and gives the same protection to all for the preservation of life, liberty and property, and the pursuit of happiness.*" Id., 127.

In *Ah Kow v. Nunan*, 5 Saw., 562; 3 Pacific Coast Law Journal, 413, Mr. Justice Field observes: "But in our country hostile and *discriminating legislation by a state* against persons of any class, sect, creed or nation, in whatever form it may be expressed, *is forbidden by the fourteenth amendment of the constitution.* That amendment, in its first section, declares who are citizens of the United States, and then enacts that no state shall make or enforce any law which shall abridge their privileges and immunities. It further declares that no state shall deprive *any person* (dropping the distinctive term citizen) of life, liberty or property without due process of law, nor deny to *any person* the equal protection of the laws. This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one while within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others; and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment." And the same views are expressed with equal emphasis in *In re Ah Fong*, 3 Saw., 157. Discriminating state legislation has often been held void by the supreme court, as being in violation of other provisions of the national constitution, no more specific than the fourteenth amendment. *Welton v. State of Missouri*, 1 Otto, 277 (§§ 1379-83, *infra*); *Cook v. Pennsylvania*, 7 Otto, 572 (§§ 1478-80, *infra*), and numerous cases cited.

§ 1004. — *such a denial is analogous to the confinement of the selection of jurors to white persons, which is in violation of that amendment.*

Since the foregoing was written I have received the opinion of the supreme court of the United States in *Strauder v. West Virginia*, recently decided [10 Otto, 303; §§ 920-928, *supra*], which appears to me to authoritatively dispose of the point now under consideration. The case was an indictment of a colored man for murder, and the statute of West Virginia limited the qualified jurors to white citizens. The statute stating the qualifications of jurors was in the following words: "All white male persons, who are twenty-one years of age, and who are citizens of this state, shall be liable to serve as jurors, except

as herein provided" — the exceptions being state officials. This was claimed to be a violation of the fourteenth amendment, as excluding colored citizens otherwise qualified from jury service; and the supreme court so held. The court, in deciding the case, says the fourteenth amendment "ordains that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory; but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race — the right to exemption from unfriendly legislation against them distinctively, as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of the enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race. *That the West Virginia statute respecting juries* — the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error — *is such a discrimination, ought not to be doubted, nor would it be if the persons excluded by it were white men.*" 10 Alb. Law Jour., 227.

In speaking of the act to enforce this amendment, the court further says: Sections 1977 and 1978 of the Revised Statutes, before cited, "partially enumerate the rights and immunities intended to be guarantied by the constitution;" and that "this act puts in the form of a statute what had been substantially ordained by the constitutional amendment." *Id.*, 228. If this exclusion of colored men from sitting upon a jury by *implication* is a violation of the constitution, as denying the equal protection of the laws to colored persons, *a fortiori* must the express positive provisions of the constitution and act of the legislature of the state of California be in conflict with that instrument, as denying the equal protection of the laws to the Chinese residents of the state. Upon reason and these authorities, then, it seems impossible to doubt that the provisions in question are both, in letter and spirit, in conflict with the constitution and laws of the United States, as well as with the stipulations of the treaty with China. And this constitutional right is wholly independent of any treaty stipulations, and would exist without any treaty whatever, so long as Chinese are permitted to come into and reside within the jurisdiction of the United States. The protection is given by the constitution itself, and the laws passed to give it effect, irrespective of treaty stipulations.

§ 1005. *The power of the state of California over corporations is not unlimited. It cannot operate a violation of the constitution of the United States, or of treaties and laws made under its sanction.*

But it is urged on behalf of the respondent that, under the provisions of article 12 of the state constitution, providing that "all laws . . . concerning corporations . . . may be altered, from time to time, or repealed," the power of the legislature over corporations is absolutely unlimited; that it may, by legislation under this reserved power, impose any restrictions or limitations upon the acts and operations of corporations, however unreasonable, stringent or injurious to their interests; and, as a penalty for violating such restrictions, destroy them, and criminally punish their officers, agents, servants, employees,

assignees or contractors; that, as a condition of continued existence, they may be prohibited from employing Chinese, and the prohibition enforced against the corporation and the persons named, by means of the penalties indicated; and thus, by means of the state's control over the corporation created by its authority, it can indirectly accomplish the purpose of excluding the Chinese from, perhaps, their largest and most important field of labor—a purpose *which could not be accomplished by direct means*. This position the attorney-general and the other counsel for the respondent most earnestly press, and upon it they most confidently rely.

I do not assent to any such unlimited power over corporations. There must be—there is—a limit somewhere. That there is such a limit is recognized and expressly asserted in numerous cases by the supreme court of the United States, and by the highest courts of many of the states; and I know of none to the contrary. But precisely where the line is to be drawn, I confess, in the present state of the authoritative adjudications, I am unable to say. I am inclined to the opinion, however, that it would exclude legislation of the character in question, even if it concerned the state and the corporations alone, and did not conflict with other rights protected by treaties with foreign nations, or by the constitution of the United States—the supreme law of the land. But assume it to be otherwise. When the state legislation affecting its corporations comes in conflict with the stipulations of valid treaties, and with the national constitution, and laws made in pursuance thereof, it must yield to their superior authority. And such, in my judgment, are the provisions in question. The policy of the constitutional provision and statute in question does not have in view the relations of the corporation to the state, as the object to be effected or accomplished; but it seeks to reach the Chinese, and exclude them from a wide range of labor and employment, the ultimate end to be accomplished being to drive those already here from the state, and prevent others from coming hither—the *discriminating legislation being only the means by which the end is to be attained—the ultimate purpose to be accomplished. The end sought to be attained is unlawful*. It is in direct violation of our treaty stipulations and the constitution of the United States. The end being unlawful and repugnant to the supreme law of the land, it is equally unlawful, and equally in violation of the constitution and treaty stipulations, to use any means, however proper, or within the power of the state for lawful purposes, for the attainment of that unlawful end, or accomplishment of that unlawful purpose. It cannot be otherwise than unlawful to use any means whatever to accomplish an unlawful purpose. This proposition would seem to be too plain to require argument or authority. Yet there is an abundance of authority on the point, although perhaps not stated in this particular form. *Brown v. State of Maryland*, 12 Wheat, 419 (§§ 1466–70, *infra*); *Ward v. Maryland*, 12 Wall., 431 (§§ 825–828, *supra*); *Woodruff v. Parham*, 8 Wall., 130 (§§ 1471–73, *infra*); *Hinson v. Lott*, *id.*, 152; *Welton v. State of Missouri*, 1 Otto, 279 (§§ 1379–83, *infra*); *Cook v. Pennsylvania*, 7 Otto, 573 (§§ 1478–80, *infra*). These cases hold that the power of taxation, and power to require licenses, are legitimate powers, to be exercised without discrimination; but they are unlawful and unconstitutional when used to discriminate against foreign goods or manufacturers of other states. That is to say, they are constitutional and lawful when used for a constitutional and lawful purpose, but unlawful, and in violation of the constitution, when used to attain an unlawful or unconstitutional end. And whatever form the law may take on, or in whatever language be couched, the

court will strip off its disguise, and judge of the purpose from the manifest intent as indicated by the effect.

In *Cummings v. State of Missouri*, Mr. Justice Field, in speaking for the court, says: "The difference between the last case supposed and the case as actually presented is one of form only, and not substance. . . . The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing, it is only disguised. The legal result must be the same; for what cannot be done directly cannot be done indirectly. The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." 4 Wall., 325 (§§ 608-618, *supra*). See, also, *Henderson v. Mayor of New York*, 2 Otto, 268 (§§ 1336-42, *infra*); *Chy Lung v. Freeman*, *id.*, 279 (§§ 1343-44, *infra*); *Railroad Co. v. Husen*, 5 Otto, 472 (§§ 1062-65, *infra*).

In *Doyle v. Continental Ins. Co.*, 4 Otto, 535 (§§ 2510-15, *infra*), most confidently relied on by the respondent, the end to be accomplished—the exclusion of a foreign corporation from doing business in the state, except upon conditions prescribed by the state—was lawful, and the means adopted lawful. There were no rights secured by treaty or the national constitution violated. The state and the foreign corporation were the only parties, and their rights the only rights affected. Had the legislature, instead of prohibiting the corporation from doing business in the state, as a penalty for violation of the conditions prescribed, attempted to enforce compliance by *criminally punishing the agent* who transferred the action brought against the corporation from the state to the national court, the question would certainly have been different, and the statute making the transfer a misdemeanor would have been void; for, under the constitution of the United States, the foreign corporation had a right to transfer the case, of which the state could not by law, nor the corporation by stipulation, deprive it, as was held in *Insurance Co. v. Morse*, 20 Wall., 445 (§§ 2505-2509, *infra*). It being lawful to transfer, and the right to transfer being secured by the national constitution, it was incompetent for the legislature to make the transfer an offense, and punish it as such in violation of the supreme law of the land. The act could not at the same time be both lawful and criminal. And this is the plain distinction between the case relied on and the one now under consideration.

The object, and the only object, to be accomplished by the state constitutional and statutory provisions in question is manifestly to restrict the right of the Chinese residents to labor, and thereby deprive them of the means of living, in order to drive those now here from the state, and prevent others from coming hither; and this abridges their privileges and immunities, and deprives them of the equal protection of the laws, in direct violation of the treaty and constitution—the supreme law of the land. To perceive that the means employed are admirably adapted to the end proposed, it is only necessary to consider for a moment some of the leading provisions of article 19 of the state constitution. Section 1 provides that "the legislature shall prescribe all necessary regulations for the protection of the state . . . from the burdens and evils arising from the presence of aliens who are or *may become* vagrants,

paupers, mendicants, criminals, etc., . . . and to impose conditions upon which such persons may reside in the state, and to provide the means and mode of their removal from the state upon failure or refusal to comply with such conditions."

Section 2 is the one which prohibits any corporation from employing, directly or indirectly, in any capacity, any Chinese or Mongolians; and section 3 provides that "no Chinese shall be employed on any state, municipal, or other work, except in punishment for crime." After providing for the removal from the state of all who "*may become* vagrants, paupers," etc., it is difficult to conceive of any more effectual means, so far as they go, to reduce the Chinese to "vagrants, paupers, mendicants and criminals," in order that they may be removed, than to forbid their employment, "directly or indirectly, in any capacity"—that is to say, to exclude them from engaging in useful labor. If it is competent for the state to enforce these provisions, it may also prohibit corporations from dealing with them in any capacity whatever—from purchasing from or selling to them any of the necessities of life, or any article of trade and commerce.

In view of the vast extent of the field of labor and business now engrossed by corporations, to exclude the Chinese from all dealings with corporations is to reduce their means of avoiding vagrancy, pauperism and mendicity to very narrow limits; and from the present temper of our people, and the number of bills now pending before the legislature tending to that end, there can be no doubt that if the legislation now in question can be sustained, the means of avoiding the condition of pauperism denounced in the state constitution and laws would soon be reduced to the *minimum*.

In the language of Deady, J., in *Baker v. City of Portland*, "admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and overriding the treaty-making power altogether." 5 Saw., 750; 3 Pacific Coast L. J., 469.

Vagrancy and pauperism, one would suppose, ought to be discouraged rather than induced by solemn constitutional mandates requiring legislation necessarily leading to such vices. Common experience, I think, would lead to the conclusion that the Chinese within the state, with equal opportunities, are as little likely to fall into vagrancy, pauperism and mendicity, and thereby become a public charge, as any other class, native or foreign born. Industry and economy, by which the Chinese are able to labor cheaply and still accumulate large amounts of money to send out of the country—the objection perhaps most frequently and strenuously urged against their presence,—are not the legitimate parents of "vagrancy, pauperism, mendicity and crime." There are other objections to an unlimited immigration of that people, founded on distinctions of race and differences in the character of their civilization, religion, and other habits, to my mind of a far more weighty character. But these, unfortunately for those seeking to evade treaty stipulations and constitutional guaranties, can by no plausible misnomer be ranged under the police powers of the state.

§ 1006. *The remedy against Chinese immigration is with the federal government.*

Holding, as we do, that the constitution and statutory provisions in question are void, for reasons already stated, we deem it proper again to call public attention to the fact, however unpleasant it may be to the very great majority of the citizens of California, that however undesirable, or even ultimately dan-



gerous to our civilization, an unlimited immigration of Chinese may be, the remedy is not with the state, but with the general government. The Chinese have a perfect right, under the stipulations of the treaty, to reside in the state, and enjoy all privileges, immunities and exemptions that may there be enjoyed by the citizens and subjects of any other nation; and, under the fourteenth amendment to the national constitution, the right to enjoy "life, liberty and property," and "the equal protection of the laws," in the same degree and to the same extent as these rights are enjoyed by our own citizens; and in the language of Mr. Justice Bradley, in the Slaughter-House Cases [16 Wall., 36; §§ 752-801, *supra*], "*the whole power of the nation is pledged to sustain those rights.*" To persist, on the part of the state, in legislation in direct violation of these treaty stipulations, and of the constitution of the United States, and in endeavoring to enforce such void legislation, is to waste efforts in a barren field, which, if expended in the proper direction, might produce valuable fruit; and, besides, it is little short of incipient rebellion.

In 1870 the Chinese at Tien-tsin, actuated by similar unfriendly feelings and repugnance towards foreigners of the Caucasian race, made a riotous attack upon the missionaries stationed at that place, killed some French and Russian citizens, and destroyed the buildings and property of French, Russian and American residents. These powers promptly and energetically demanded satisfaction from the Chinese empire under their various treaties. The result was that fifteen Chinese were convicted and executed, and twenty others banished. The two magistrates having jurisdiction as heads of the city government were also banished, for not taking effectual means to suppress the riot and protect the foreigners. The buildings of the American citizens were re-erected, and the property destroyed paid for, to the satisfaction of the parties suffering, and at the expense of the city. Papers on Foreign Relations for 1871. Thus, under the same treaty which guaranties the rights of Chinese subjects to reside and pursue all lawful occupations in California, the United States were prompt to demand satisfaction for injuries resulting to our citizens from infractions of the treaty by citizens of China. And the Chinese government promptly punished the guilty parties, and made ample satisfaction for the pecuniary losses sustained. It ought to be understood by the people of California, if it is not now, that the same measure of justice and satisfaction which our government demands and receives from the Chinese emperor for injuries to our citizens, resulting from infractions of the treaty, must be meted out to the Chinese residents of California who sustain injuries resulting from infractions of the same treaty by our own citizens, or by other foreign subjects residing within our jurisdiction, and enjoying the protection of similar treaties and of our laws. And it should not be forgotten that in case of destruction of, or damage to, Chinese property by riotous or other unlawful proceedings, the city of San Francisco, like the more populous city of Tien-tsin, may be called upon to make good the loss.

§ 1007. *The fourteenth amendment of the constitution and the laws passed to carry out its principles. Their bearing upon the rights of Chinese immigrants under the Chinese treaty.*

In view of recent events transpiring in the city of San Francisco, in anticipation of the passage of the statute now in question, which have become a part of the public history of the times, I deem it not inappropriate in this connection to call attention to the fact, of which many are probably unaware, that the statutes of the United States are not without provisions, both of a

civil and criminal nature, framed and designed expressly to give effect to and enforce that provision of the fourteenth amendment to the national constitution, which guaranties to every "person"—which term, as we have seen, includes Chinese—"within the jurisdiction" of California "the equal protection of the laws." Section 1979 of the Revised Statutes provides a civil remedy for infractions of this amendment. It is as follows: "Every person who, under the color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities, secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Thus a remedy by action is given to any "person," against any other person who deprives him of "any right, privilege or immunity," secured to him by the constitution, even if it is done "under color of any statute, ordinance, regulation, custom or usage of the state." Possibly the prisoner might have been liable had he, in pursuance of the mandate of the statute in question, *and on that ground*, discharged the Chinamen for whose employment he is now under arrest. But it is unnecessary to so determine now. At all events, he stood between two statutes, and he was bound to yield obedience to that which is superior.

Section 5510 makes a similar deprivation of rights under color of any statute, etc., a criminal offense, punishable by fine and imprisonment. And section 5519 provides that "if two or more persons in any state . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law, . . . each of such persons shall be punished by a fine of not less than \$500 nor more than \$5,000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment." These provisions of the United States statutes—the supreme law of the land—are commended to the consideration of all persons who are disposed to go from place to place, and, by means of threats and intimidation, endeavor to compel employers to discharge peaceable and industrious Chinamen engaged in their service. There are other provisions, both civil and criminal, of a similar character, having the same end in view.

Only a few days since the supreme court of the United States sustained an indictment in *In re Coles* and *The Commonwealth of Virginia*, petitioners, on *habeas corpus*, against a county judge of Virginia, found under section 4 of the Civil Rights Act of 1875 (18 Stat., 336), for failing to summon colored citizens as jurors, "on account of race and color." The court held this act to be constitutional and valid under the fourteenth amendment, *and that it deprived colored citizens of the equal protection of the laws*. Thus it appears that congress, by the most stringent statutory provisions, has provided for the protection of all citizens and persons within the jurisdiction of the United States, in the full and complete enjoyment of the "equal protection of the laws," and of all "privileges and immunities guarantied" by the fourteenth amendment, in all their phases; and that the highest judicial tribunal of the nation has deemed it its duty to give such statutory provisions the fullest and most complete effect.

The result is that the prisoner is in custody in violation both of the constitution and laws of the United States, and of the treaty between the United States and the empire of China, and is entitled to be discharged; and it is so ordered.

§ 1008. *In general.*—The fourteenth amendment, which guaranties the equal benefit of the laws, only prohibits state legislation violative of this right, and is not directed against individual infringements thereof. *Ex parte Wells*, 3 Woods, 128.

§ 1009. It was not the purpose of the recent amendments to the constitution to confer any rights or privileges of social equality among men. They were intended to secure freedom and the benefits of citizenship to colored men, and protect their civil rights against hostile legislation by the states. All state laws which discriminate against colored people as a race, and deny them equal civil rights with other citizens, are prohibited by the constitution. The Civil Rights Bill,\* 1 Hughes, 541.

§ 1010. *Legislation by congress.*—When any atrocity is committed, which is done on account of race, color or previous condition of servitude, it may be punished by the laws and in the courts of the United States; but any outrages, atrocities or conspiracies, whether against the colored race or the white race, which do not flow from this cause, but spring from the ordinary felonious or criminal intent which prompts such unlawful acts, are within the sole jurisdiction of the states, unless the state laws deny to any particular race equality of rights, in which case the United States may furnish remedy and redress to the fullest extent and in the most direct manner. *United States v. Cruikshank*,\* 1 Woods, 308.

§ 1011. Congress has power to make it a penal offense to conspire to deprive a person of, or hinder him in, the exercise and enjoyment of the rights and privileges conferred by the thirteenth amendment and the laws passed in pursuance thereof. But to constitute an offense of which congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color or previous condition of servitude. Otherwise the case is exclusively within the jurisdiction of the state and its courts. *Ibid.*

§ 1012. A corporation is not a citizen or a person within the meaning of the fourteenth amendment, which forbids the states to deny to any person within their jurisdiction the equal protection of the laws. An unequal tax upon a corporation by a state is not, therefore, an infringement of any right secured by the fourteenth amendment. *Insurance Co. v. New Orleans*, 1 Woods, 85. *Contra*, *Fertilizing Co. v. Town of Hyde Park*, 3 Biss., 481.

§ 1013. *Service on juries.*—The following is an extract from the charge of Rives, J., in his charge to the grand jury on the exclusion of colored persons from jury service: "It so happens that under the state laws the duty of making out and returning jury lists is devolved upon the judges of the county and corporation courts. Code of Virginia, section 3, chapter 157, p. 1059. The act in question has, therefore, to deal with these officers. It is at this point congress intervenes, and constrains them by penalties to observe these provisions, which have naturally grown out of the fourteenth amendment. The offense thus denounced consists in the exclusion by these officers from their jury lists of qualified citizens because of their race, color or previous condition of servitude. The motive makes and constitutes the misdemeanor. It may be difficult to prove. It is not given to you to know what passes in the mind of another; but like all unlawful intents the evidence of it may be found in presumptions of fact. When this intent has been declared, or where a demand of a lawful jury without this discrimination has been refused, the offense would be clearly made out, provided you believe the witness to the declaration or denial. But such indubitable proof may not often be expected. You must look to the surrounding circumstances of the case and the overt acts of the parties to fix the intention of the latter in this exclusion. If it should appear to you that such officer has, by a long and unvarying course, refused to put on his lists the names of colored persons duly qualified, you would be compelled to accept this conduct as evidence of his guilt, indict him for the offense, and give him the opportunity to repel these strong presumptions of fact against him. If, on the contrary, it shall appear that these officers have sometimes listed, or offered to summon when asked, juries without this discrimination of race, you would scarcely be justified to impute this unlawful intent to such occasional omission. It is, in my view, the habitual neglect or the special denial in civil or criminal suits involving the antipathies of race that is aimed at by this act of congress. I trust it will be sufficient for the ends of public justice that attention should be attracted to this law by your findings. I cannot and do not suspect these officers of obstinate or determined disobedience to law. That may be determined by the future. It is the observance of the law, and not punishment for the violation, that is sought." *Cases of the County Justices of Virginia*,\* 3 Hughes, 576.

§ 1014. *Right of appeal.*—By the constitution and laws of Missouri, an appeal lies to the supreme court of the state from any final judgment or decree of any circuit court, except those in certain counties and the city of St. Louis. For these counties and this city the constitution of 1875 establishes a separate court of appeal, called the St. Louis court of appeals, and gives to this court exclusive jurisdiction of all appeals from, and writs of error to, the circuit courts of those counties and of the said city. From this court an appeal lies to the

supreme court only in cases where the amount in dispute exceeds the sum of \$2,500, and in cases involving the construction of the constitution of the United States or of Missouri, and in some other cases of a special character, which are enumerated. It is held that this is within the undoubted power of the state to regulate the jurisdiction of its own tribunals for the different portions of its territory, and is not in conflict with the equality clause in the fourteenth amendment. *Missouri v. Lewis*, \* 11 Otto, 22.

§ 1015. **Remedy in federal courts.**—An alien and subject of a country having treaty relations with the United States has the right to invoke the aid of the federal courts for protection, when his rights, guaranteed by the treaty, or the constitution, or any law of congress, are in any respect invaded. A decision of the state courts denying such rights is not binding on the federal courts. *In re Ah Fong*, \* 8 Saw., 144.

§ 1016. **Demanding a bond on landing of foreigners.**—A state law excluding all foreigners of certain classes coming into the state by water, except upon the execution of a bond by the master of the vessel that they will not become a public charge, violates the fourteenth amendment and the act of May 31, 1870, which provides that "no tax or charge shall be imposed or enforced by any state upon any person immigrating thereto from a foreign country which is not equally imposed upon every person immigrating to such state from any other foreign country," since it leaves all other foreigners of the same classes entering the state by any other means than by water exempt from any charge. *Ibid*.

§ 1017. **Cutting hair of Chinese.**—The ordinance of the city of San Francisco, passed June 14, 1876, declaring that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, shall, immediately upon his arrival at the jail, have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof," being intended only for the Chinese in San Francisco, and understood so by every one, the loss of his queue by a Chinaman being a disgrace in the eyes of his fellow Chinamen, and subjecting him, according to his religious belief, to punishment after death, is contrary to the fourteenth amendment, which forbids the states to deny to any person the equal protection of the laws. This inhibition applies to all the agencies employed in the administration of the government of the state, and to the legislative bodies of cities and counties. *Ah Kow v. Nunan*, \* 5 Saw., 552.

§ 1018. **Act forbidding exhuming of bodies.**—The act of the legislature of California, forbidding under penalty the exhuming of bodies of deceased persons, or the carrying of such exhumed bodies through the streets or highways, except upon a permit from the health officer, and requiring the payment of \$10 for every such permit in order to defray the expense of inspection and supervision, and excepting from its operation the removal of bodies from one cemetery to another within same county, but making no other exception or discrimination, is no violation of the fourteenth amendment when applied to the removal of Chinese bodies for transportation to China. *In re Wong Yung Quy*, \* 6 Saw., 442.

§ 1019. **Right to fish in waters of the state.**—The act of the legislature of California of April 23, 1880, which, in connection with former acts, substantially prohibits, under penalty, the Chinese from fishing in the waters of the state, while permitting other foreigners to exercise the privilege, violates the fourteenth amendment and the Burlingame treaty. *In re Ah Chong*, \* 6 Saw., 451.

§ 1020. **Regulating use of railroad.**—An ordinance forbidding a railroad to operate in a particular street in the city, where it does not appear that any other corporation is allowed to run in that street, and that there is no greater necessity for keeping that street unobstructed than to exclude other corporations from other streets, is not a denial of "equal protection of the laws." *Railroad Company v. Richmond*, 6 Otto, 531 (§§ 2158-60).

§ 1021. **Warehouse charges.**—A statute regulating charges by warehousemen in cities does not deny to them the equal protection of the laws. *Munn v. Illinois*, 4 Otto, 113 (§§ 1349-67).

§ 1022. **Denial of right to testify.**—Upon an indictment of white persons for burglary in entering the house of a negro, prosecuted in the circuit court of the United States, under the Civil Rights Act of congress of April 6, 1866, because the negro, being a citizen of the United States, was not allowed to testify against the defendants in the courts of the state, it was held that the first section of this act, providing that all citizens of the United States shall have the same rights in every state to sue, be parties and give evidence, and the third section giving jurisdiction to the United States circuit court of all causes affecting persons who are denied, or cannot enforce in the courts of the state where they may be, any of the rights secured to them by the first section, and in fact all the provisions of this law, were authorized by the thirteenth amendment. *United States v. Rhodes*, 7 Am. L. Reg. (N. S.), 233; 1 Abb., 28. See § 878.

## VIII. REGULATION OF COMMERCE.

1. *In General.*

**SUMMARY**—*Constitutional provisions, § 1023.—State tax on legacies due non-residents, § 1024.—Tax on brokers dealing in foreign bills, § 1025.—Taxing power of the states, § 1026.—Power of congress extends to new instrumentalities, § 1027; such as telegraphs, § 1028.—Commerce of corporations, § 1029.—Requiring license of foreign insurance companies, § 1030.—Contracts for receiving and discharging grain at warehouse, § 1031.—State law prohibiting importation of cattle, § 1032.—Police power; quarantine and inspection laws, § 1033.*

§ 1023. "The congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Const., art. I, sec. 8. "No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state be obliged to enter, clear or pay duties in another." Art. I, sec. 9. "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage." Art. I, sec. 10.

§ 1024. A state tax on legacies, when the legatee is neither a citizen of the United States nor a resident within the state, is constitutional; it has no concern with commerce or with imports or exports. *Mager v. Grima*, § 1034.

§ 1025. A tax on exchange and money brokers is not a regulation of commerce, though the brokers deal exclusively in foreign bills. *Nathan v. Louisiana*, §§ 1035-37.

§ 1026. The taxing power of a state is one of its attributes of sovereignty; and where there has been no compact with the federal government, or cession of jurisdiction for purposes specified in the constitution, this power reaches all the property and business within the state, which are not properly denominated the means of the general government. *Ibid.* See II, 8; § 848.

§ 1027. The power given to congress to regulate commerce is not confined to the instrumentalities of commerce known or in use when the constitution was adopted, but keeps pace with the progress of the country and adapts itself to the new developments of time and circumstances. *Pensacola Tel. Co. v. Western Union Tel. Co.*, §§ 1038-51.

§ 1028. Therefore when the telegraph became such an instrument, congress had the power to immediately apply its powers to securing its full benefit as an incident to commerce and to enact legislation to that end. And congress having by its act of July 24, 1866, assumed jurisdiction over the telegraph and forbidden any state to exclude any corporation from establishing a line within its limits after it had complied with the conditions prescribed by congress, a law of a state granting to a corporation the exclusive right to maintain telegraph lines in certain territory through which any line must pass to reach an important sea-port and United States naval station, from two important directions, is void as a regulation of commerce between the states. *Ibid.* See § 1099.

§ 1029. Congress has power to regulate the commerce of corporations. *Paul v. Virginia*, §§ 1052-59.

§ 1030. The business of issuing insurance policies is not commerce; and a state law requiring insurance companies to take out a license and deposit bonds with the treasurer before they shall be permitted to do business within the state, is not a regulation of commerce. *Ibid.*

§ 1031. A contract made with reference to receiving and discharging grain shipped from one state to another, being valid when made, there being no law of congress in contravention thereof, does not become discharged upon congress exercising its power to regulate commerce at the very place where such receipt and discharge takes place, although by such exercise of power the condition of things becomes so changed that the contract becomes burdensome to one of the parties. The constitutional provision vesting the power to regulate commerce in congress was never contemplated to be exercised to the injury of contract rights. *Railroad Co. v. Richmond*, §§ 1060-61.

§ 1032. A state law which prohibits the importation of cattle into the state from other states during eight months in the year, and imposes burdens on the passage of cattle through the state, is an unwarranted regulation of interstate commerce. *Railroad Co. v. Husen*, § 1062-65.

§ 1033. The deposit in congress of the power to regulate foreign and interstate commerce was not a surrender of that which may properly be denominated police power; but whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to congress by the federal constitution. While a state may establish quarantine and inspection laws, it cannot interfere with transportation into or through the state beyond what is absolutely necessary for its self-protection. *Ibid.* See §§ 266, 298, 315, 318.

[NOTES.— See §§ 1066–1102.]

MAGER v. GRIMA.

(8 Howard, 490–494. 1849.)

ERROR to the Supreme Court of Louisiana.

Opinion by TANEY, C. J.

STATEMENT OF FACTS.— This is a plain case, and when the facts are stated, the question of law may be disposed of in a few words. The plaintiff in error was the residuary legatee — or, in the language of Louisiana law, the universal legatee — of a certain John Mager, who was a native of France, and migrated to the United States after the cession of Louisiana. He died at New Orleans possessed of property to a large amount. The widow Collard is his sister. At the time of his death she was a French subject residing in France. By the law of Louisiana, a tax of ten per cent. is imposed on legacies, when the legatee is neither a citizen of the United States, nor domiciled in that state. And the executor of the deceased, or other person charged with the administration of the estate, is directed to pay the tax to the state treasurer. Felix Grima, the defendant in error, is the executor of John Mager, and retained the amount of the tax, in order to pay it over as the law directs. And this suit was brought by the legatee to recover it, upon the ground that the act of the Louisiana legislature is repugnant to the constitution of the United States.

§ 1034. *A state law imposing a tax upon legacies, payable to aliens, is not unconstitutional.*

Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state. In many of the states of this Union at this day, real property devised to an alien is liable to escheat. And if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the alien, subject to a deduction of ten per cent. for the use of the state.

In some of the states laws have been passed, at different times, imposing a tax similar to the one now in question upon its own citizens as well as foreigners; and the constitutionality of these laws has never been questioned. And if a state may impose it upon its own citizens, it will hardly be contended that aliens are entitled to exemption; and that their property in our own country is not liable to the same burdens that may lawfully be imposed upon that of our own citizens. We can see no objection to such a tax, whether imposed on citizens and aliens alike, or upon the latter exclusively. It certainly has no

concern with commerce, or with imports or exports. It has been suggested, indeed, in the argument, that as the legatee resided abroad, it would be necessary to transmit to her the proceeds of the portion of the estate to which she was entitled, and that the law was therefore a tax on exports. But if that argument was sound, no property would be liable to be taxed in a state, when the owner intended to convert it into money and send it abroad. The judgment of the state court was clearly right, and must be affirmed.

## NATHAN v. LOUISIANA.

(8 Howard, 73-83. 1849.)

Opinion by MR. JUSTICE MCLEAN.

STATEMENT OF FACTS.—This suit is brought before us by a writ of error to the supreme court of Louisiana.

By an act of the legislature of Louisiana, of the 26th of March, 1812, entitled "An act relative to the revenue of the state," it is provided, in the ninth section, that "each and every money or exchange broker shall hereafter pay an annual tax of \$250 to the state, in lieu of the tax heretofore imposed on them." The defendant below having failed to pay the tax for two years, a suit was brought against him in the district court of the state, in which a judgment for \$500 was rendered. That judgment, on an appeal to the supreme court of the state, was affirmed. The defense made was, that the sole business of the defendant was buying and selling foreign bills of exchange, which are instruments of commerce, and that the tax is repugnant to the constitutional power of congress "to regulate commerce with foreign nations and among the several states."

§ 1035. *A state law which imposes a tax upon money or exchange brokers is not repugnant to the power conferred upon congress by the constitution to regulate commerce, though such broker deal in foreign bills of exchange exclusively.*

This is not a tax on bills of exchange. Under the law, every person is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax if he engage in the business of a money or an exchange broker. The right of a state to tax its own citizens for the prosecution of any particular business or profession within the state has not been doubted. And we find that, in every state, money or exchange brokers, venders of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern-keepers, auctioneers, those who practice the learned professions, and every description of property not exempted by law, are taxed. As an exchange broker, the defendant had a right to deal in every description of paper, and in every kind of money; but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so is a bill of exchange; and, upon this ground, it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce. What is there in the products of agriculture, of mechanical ingenuity, of manufactures, which may not become the means of commerce? And is the vendor of these products exempted from state taxation, because they may be thus used? Is a tax upon a ship, as property, which is admitted to be an instrument of commerce, prohibited to a state? May it not tax the business of ship building, the same as the exercise of any other mechanical art? and also the traffic of ship-chandlers, and others, who furnish the cargo of the ship and the necessary supplies? There can be but one answer to these questions. No one

can claim an exemption from a general tax on his business, within the state, on the ground that the products sold may be used in commerce.

§ 1036. *Bills of exchange not imports nor exports.*

No state can tax an export or an import as such, except under the limitations of the constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the state, it is a subject of taxation by the state. A cotton-broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation. A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder when it becomes payable. The dealer in bills of exchange requires capital and credit. He generally draws the instrument, or it is drawn at his instance, when he is desirous of purchasing it. The bill is worth more or less, as the rate of exchange shall be between the place where it is drawn and where it is made payable. This rate is principally regulated by the expense of transporting the specie from the one place to the other, influenced somewhat by the demand and supply of specie. Now the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a state in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship-builder, without whose labor foreign commerce could not be carried on.

In the case of *Briscoe v. Bank of Commonwealth of Kentucky*, 11 Pet., 257 (§§ 539–558, *supra*), this court held that a state has power to incorporate a bank; and this power has been exercised by every state in the Union, except where it has been prohibited by its constitution. And the banks established, it is believed, have been, without exception, authorized to deal in foreign bills of exchange. And this court held, in *Providence Bank v. Billings*, 4 Pet., 514 (§§ 2321–24, *infra*), that a state had power to tax a bank, there being no clause in the charter exempting it from taxation. In the case of *Bank of Augusta v. Earle*, 13 Pet., 519 (CORPORATIONS, §§ 1123–35), it was decided that the bank established in Georgia, having a right in its charter to deal in bills of exchange, could, through its agent and the comity of Alabama, buy and sell bills in that state.

If a tax on the business of an exchange broker, who buys and sells foreign bills of exchange, be repugnant to the commercial power of the Union, all taxes on banks which deal in bills of exchange, by a state, must be equally repugnant. The constitution declares that no state shall impair the obligations of a contract, and there is no other limitation on state power in regard to contracts. In determining on the nature and effect of a contract, we look to the *lex loci* where it was made or where it was to be performed. And bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the states have adopted the law merchant, others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different states. These laws, in various forms and in numerous cases, have been sanctioned by this court. Indorsers on a protested bill are held responsible for damages under the law of the state where the in-



dorsement was made. Every indorsement on a bill is a new contract, governed by the local law. Story's Conf. of Laws, 314. For the purposes of revenue, the federal government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now the federal government can no more regulate the commerce of a state than a state can regulate the commerce of the federal government; and domestic bills or promissory notes are as necessary to the commerce of a state as foreign bills to the commerce of the Union. And if a tax on an exchange broker, who deals in foreign bills, be a regulation of foreign commerce, or commerce among the states, much more would a tax upon state paper, by congress, be a tax on the commerce of a state.

§ 1037. *Taxing power of the states.*

The taxing power of a state is one of its attributes of sovereignty. And where there has been no compact with the federal government, or cession of jurisdiction for the purposes specified in the constitution, this power reaches all the property and business within the state, which are not properly denominated the means of the general government; and, as laid down by this court, it may be exercised at the discretion of the state. The only restraint is found in the responsibility of the members of the legislature to their constituents. If this power of taxation by a state within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a state may be thereby essentially impaired. But state power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws, and also the numberless enterprises in which its citizens may be engaged. These are subjects of state regulation and state taxation, and there is no federal power under the constitution which can impair this exercise of state sovereignty.

We think the law of Louisiana, imposing the tax in question, is not repugnant to any power of the federal government, and, consequently, the judgment of the supreme court of the state is affirmed.

PENSACOLA TELEGRAPH COMPANY *v.* WESTERN UNION TELEGRAPH COMPANY.

(6 Otto, 1-24. 1876.)

APPEAL from U. S. Circuit Court, Northern District of Florida.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—Congress has power “to regulate commerce with foreign nations and among the several states” (Const., art. 1, sec. 8, par. 3), and “to establish postoffices and post-roads” (id., par. 7). The constitution of the United States, and the laws made in pursuance thereof, are the supreme law of the land. Art. 6, par. 2. A law of congress made in pursuance of the constitution suspends or overrides all state statutes with which it is in conflict. Since the case of *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *infra*), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of congress. Postoffices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of congress, because, being national in their operation, they should be under the protecting care of the national government.

§ 1038. *The powers of congress over commerce keep pace with the progress of the country, and extend to the regulation of the telegraph as an instrument of commerce.*

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent. of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of congress, certainly as against hostile state legislation. In fact, from the beginning, it seems to have been assumed that congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by congress for that purpose (5 Stat., 618); and large donations of land and money have since been made to aid in the construction of other lines (12 id., 489, 772; 13 id., 365; 14 id., 292). It is not necessary now to inquire whether congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that congress has power, by appropriate legislation, to prevent the states from placing obstructions in the way of its usefulness. The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

§ 1039. *A law granting a monopoly to a telegraph company in a certain portion of the state's territory, through which territory a line must pass to reach an important sea-port and United States arsenal, is a regulation of commerce between the states.*

The state of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the state, and extends from Alabama to the gulf. No telegraph line can cross the state from east to west, or from north to south, within these counties, except it passes over this territory. Within it is situated an important sea-port, at which business centers, and with which those engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the national government. They have a navy-yard, forts, custom-houses, courts, postoffices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other states and those residing upon this territory, except by the employment of this corporation. The United States cannot communicate with their own officers by telegraph except in the same way. The state, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other states, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

§ 1040. *The act of congress of July 24, 1866, prohibits state monopolies in the operation of telegraph lines.*

It is unnecessary to decide how far this might have been done if congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect, amounts to a prohibition of all state monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the states, and is appropriate legislation to carry into execution the powers of congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide, that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

§ 1041. — *its operation is not limited to military and post roads of the United States which are upon the public domain.*

It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is, "Through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress, and over, under or across the navigable streams or waters of the United States."

There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted.

§ 1042. *A state law conferring the exclusive right of erecting telegraph lines is in conflict with the act of congress of July 24, 1866, and inoperative against a corporation of another state.*

The state law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of congress. To that extent it is, therefore, inoperative as against a corporation of another state entitled to the privileges of the act of congress. Such being the case, the charter of the Pensacola Company does not exclude the Western Union Company from the occupancy of the right of way of the Pensacola & Louisville Railroad Company under the arrangement made for that purpose.

§ 1043. *Power of the states to exclude foreign corporations.*

We are aware that in *Paul v. Virginia*, 8 Wall., 168 (§§ 1052-59, *infra*), this court decided that a state might exclude a corporation of another state from its jurisdiction, and that corporations are not within the clause of the constitution which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Art. 4, sec. 2. That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the court to show that, if it had been, very different questions would have been presented. The language of the opinion is: "It is undoubtedly true, as stated by counsel, that the power conferred upon congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. . . . This state of facts forbids the supposition that it was intended in the grant of power to congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on: it is general, and includes alike commerce by individuals, partnerships, associations and corporations. . . . The defect of the argument lies in the character of their (insurance companies) business. Issuing a policy of insurance is not a transaction of commerce. . . . Such contracts (policies of insurance) are not interstate transactions, though the parties are domiciled in different states."

The questions thus suggested need not be considered now, because no prohibitory legislation is relied upon, except that which, as has already been seen, is inoperative. Upon principles of comity, the corporations of one state are permitted to do business in another, unless it conflicts with the law, or unjustly interferes with the rights of the citizens of the state into which they come. Under such circumstances, no citizen of a state can enjoin a foreign corporation from pursuing its business. Until the state acts in its sovereign capacity,

individual citizens cannot complain. The state must determine for itself when the public good requires that its implied assent to the admission shall be withdrawn. Here, so far from withdrawing its assent, the state, by its legislation of 1874, in effect, invited foreign telegraph corporations to come in. Whether that legislation, in the absence of congressional action, would have been sufficient to authorize a foreign corporation to construct and operate a line within the two counties named, we need not decide; but we are clearly of the opinion, that, with such action and a right of way secured by private arrangement with the owner of the land, this defendant corporation cannot be excluded by the present complainant.

*Decree affirmed.*

Dissenting opinion by MR. JUSTICE FIELD.

I am compelled to dissent from the judgment of the court in this case, and from the reasons upon which it is founded; and I will state with as much brevity as possible the grounds of my dissent. The bill was filed to obtain an injunction restraining the defendant from erecting, using or maintaining a telegraph line in the county of Escambia, Florida, on the ground that, by a statute of the state passed in December, 1866, the complainant had acquired the exclusive right to erect and use lines of telegraph in that county for the period of twenty years. The court below denied the injunction and dismissed the bill, upon the ground that the statute was in conflict with the act of congress of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes." 14 Stat., 221.

The statute of Florida incorporated the Pensacola Telegraph Company, which had been organized in December of the previous year, and in terms declared that it should enjoy "the sole and exclusive privilege and right of establishing and maintaining lines of electric telegraph in the counties of Escambia and Santa Rosa, either from different points within said counties, or connecting with lines coming into said counties, or either of them, from other points in this or any other state." Soon after its organization, and in 1866, the company erected a line of telegraph from the city of Pensacola, through the county of Escambia, to the southern boundary of Alabama, a distance of forty-seven miles, which has since been open and in continuous operation. It was located, by permission of the Alabama & Florida Railroad Company, along its line of railway. After the charter was obtained, the line was substantially rebuilt, and two other lines in the county were erected by the company.

In February, 1873, the legislature of Florida passed an act granting to the Pensacola & Louisville Railroad Company, which had become the assignee of the Alabama & Florida Railroad Company, the right to construct and operate telegraph lines upon its right of way from the Bay of Pensacola to the junction of its road with the Mobile & Montgomery Railroad, and to connect the same with the lines of other companies. By an amendatory act passed in the following year (February, 1874), the railroad company was authorized to construct and operate the lines, not only along its road as then located, but as it might be thereafter located, and along connecting roads in the county, to the boundary of Alabama, and to connect and consolidate them with other telegraph companies, and to sell and assign the property appertaining to them, and the rights, privileges and franchises conferred by the act; and it empowered the assignee, in such case, to construct and operate the lines, and to enjoy these rights, privileges and franchises. Under this amendatory act, and soon after

its passage, the railroad company assigned the rights, privileges and franchises thus acquired to the Western Union Telegraph Company, the defendant herein, a corporation created under the laws of the state of New York, which at once proceeded to erect a line from the city of Pensacola to the southern boundary of Alabama, along the identical railway on which the complainant's line was erected in 1866, and has been located ever since, with the avowed intention of using it to transmit for compensation messages for the public in the county and state. By the erection and operation of this line, the complainant alleges that its property would become valueless, and that it would lose the benefits of the franchises conferred by its charter.

§ 1044. *A state can confer upon a corporation the exclusive right for a limited period to operate telegraph lines.*

There can be no serious question that the state of Florida possessed the absolute right to confer upon a corporation created by it the exclusive privilege for a limited period to construct and operate a telegraph line within its borders. Its constitution, in existence at the time, empowered the legislature to grant exclusive privileges and franchises to private corporations for a period not exceeding twenty years. The exclusiveness of a privilege often constitutes the only inducement for undertakings holding out little prospect of immediate returns. The uncertainty of the results of an enterprise will often deter capitalists, naturally cautious and distrustful, from making an investment without some assurance that, in case the business become profitable, they shall not encounter the danger of its destruction or diminution by competition. It has, therefore, been a common practice in all the states to encourage enterprises having for their object the promotion of the public good, such as the construction of bridges, turnpikes, railroads and canals, by granting for limited periods exclusive privileges in connection with them. Such grants, so far from being deemed encroachments upon any rights or powers of the United States, are held to constitute contracts, and to be within the protecting clause of the constitution prohibiting any impairing of their obligation. The grant to the complainant was invaded by the subsequent grant to the Pensacola & Louisville Railroad Company. If the first grant was valid, the second was void, according to all the decisions of this court, upon the power of a state to impair its grant, since the Dartmouth College Case. The court below did not hold otherwise, and I do not understand that a different view is taken here; but it decided, and this court sustains the decision, that the statute making the first grant was void, by reason of its conflict with the act of congress of July 24, 1866.

§ 1045. *Congress has no power over telegraph lines other than those over military and post roads on the public domain.*

With all deference to my associates, I cannot see that the act of congress has anything to do with the case before us. In my judgment it has reference only to telegraph lines over and along military and post roads on the public domain of the United States. The title of the act expresses its purpose, namely, "To aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes." The aid conferred was a grant of the right of way over the public domain; the act does not propose to give aid in any other way. Its language is, that any telegraph company organized under the laws of a state "shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain, over and along any of the military and post roads

which have been or may hereafter be declared such by act of congress, and over and across the navigable streams or waters of the United States." The portion of the public domain which may be thus used is designated by reference to the military and post roads upon it. Were there any doubt that this is the correct construction of the act, the provision which follows in the same section would seem to remove it; namely, that any of the said companies shall "have the right to take and use from *such public lands* the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the *unoccupied public lands*, subject to pre-emption, through which its said lines of telegraph may be located, as may be necessary for its stations, not exceeding forty acres for each station, but such sections shall not be within fifteen miles of each other." In the face of this language, the italics of which are mine, there ought not to be a difference of opinion as to the object of the act or as to its construction. The conclusion reached by the majority of the court not only overlooks this language but implies that congress intended to give aid to the telegraph companies of the country,—those existing or thereafter to be created,—not merely by allowing them to construct their lines over and along post-roads upon the public lands, but also over and along such roads within the states which are not on the public lands, where, heretofore, it has not been supposed that it could rightfully exercise any power.

§ 1046. *What are post-roads.*

The only military roads belonging to the United States within the states are in the military reservations; and to them the act obviously does not apply. And there are no post-roads belonging to the United States within the states. The roads upon which the mails are carried by parties, under contract with the government, belong either to the states or to individuals, or to corporations, and are declared post-roads only to protect the carriers from being interfered with, and the mails from being delayed in their transportation, and the postal service from frauds. The government has no other control over them. It has no proprietary interest in them or along them to bestow upon any one. It cannot use them without paying the tolls chargeable to individuals for similar uses; it cannot prevent the state from changing or discontinuing them at its pleasure; and it can acquire no ownership or property interest in them, except in the way in which it may acquire any other property in the states,—namely, by purchase, or by appropriation upon making just compensation. *Dickey v. Turnpike Road Co.*, 7 Dana (Ky.), 113. The public streets in some of our cities are post-roads, under the declaration of congress (R. S., sec. 3964); and it would be a strange thing if telegraph lines could be erected by a foreign corporation along such streets without the consent of the municipal and state authorities, and, of course, without power on their part to regulate its charges or control its management. Yet the doctrine asserted by the majority of the court goes to this length: that, if the owners of the property along the streets consent to the erection of such lines by a foreign corporation, the municipality and the state are powerless to prevent it, although the exclusive right to erect them may have been granted by the state to a corporation of its own creation.

§ 1047. *The powers of congress over property in the states by right of eminent domain.*

If by making a contract with a party to carry the mails over a particular road in a state, which thus becomes by act of congress for that purpose a post

road, congress acquires such rights with respect to the road that it can authorize corporations of other states to construct along and over it a line of telegraph, why may it not authorize them to construct along the road a railway, or a turnpike, or a canal, or any other work which may be used for the promotion of commerce? If the authority exist in the one case, I cannot see why it does not equally exist in the other. And if congress can authorize the corporations of one state to construct telegraph lines and railways in another state, it must have the right to authorize them to condemn private property for that purpose. The act under consideration does not, it is true, provide for such condemnation; but if the right exist to authorize the construction of the lines, it cannot be defeated from the inability of the corporations to acquire the necessary property by purchase. The power to grant implies a power to confer all the authority necessary to make the grant effectual. It was for a long time a debated question whether the United States, in order to obtain property required for their own purposes, could exercise the right of eminent domain within a state. It has been decided, only within the past two years, that the government, if such property cannot be obtained by purchase, may appropriate it, upon making just compensation to the owner (*Kohl v. United States*, 91 U. S., 367); but never has it been suggested that the United States could enable a corporation of one state to condemn property in another state, in order that it might transact its private business there.

§ 1048. *Powers of congress as to post-roads.*

We are not called upon to say that congress may not construct a railroad as a post-road, or erect for postal purposes a telegraph line. It may be that the power to establish post-roads is not limited to designating the roads which shall be used as postal routes,—a limitation which has been asserted by eminent jurists and statesmen. (a) If it be admitted that the power embraces also the construction of such roads, it does not follow that congress can authorize the corporation of one state to construct and operate a railroad or telegraph line in another state for the transaction of private business, or even to exist there, without the permission of the latter state. By reason of its previous grant to the complainant, Florida was incompetent to give such permission to the assignor of the defendant, or to any other company, to construct a telegraph line in the county of Escambia. The act of the state of February 3, 1874, in the face of this grant, can only be held to authorize the construction of telegraph lines by different companies in other counties. If, therefore, the defendant has any rights in that county, they are derived solely from the act of congress.

§ 1049. *Limits of the rights of a corporation chartered by a state.*

A corporation can have no legal existence beyond the limits of the sovereignty which created it. In *Bank of Augusta v. Earle*, 13 Pet., 519 (CORPORATIONS, §§ 1123–35), it was said by this court that “it must dwell in the place of its creation, and cannot migrate to another sovereignty.” And in *Paul v. Virginia*, 8 Wall., 163 (§§ 1052–59, *infra*), we added, that “the recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a

(a) Elliott's Debates, edition of 1833, 433, 437; Views of President Monroe accompanying his veto message of May 4, 1822; Views of Judge McLean in his dissenting opinion in *State of Pennsylvania v. Wheeling, etc.*, Bridge Co., 18 How., 441 (§§ 1208–12, *infra*).



matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." If, therefore, foreign corporations can exist in the state of Florida, and do business there by the authority of congress, it must be because congress can create such corporations for local business,—a doctrine to which I cannot assent, and which, to my mind, is pregnant with evil consequences.

In all that has been said of the importance of the telegraph as a means of intercourse, and of its constant use in commercial transactions, I fully concur. Similar language may be used with regard to railways; indeed, of the two, the railway is much the more important instrument of commerce. But it is difficult to see how from this fact can be deduced the right of congress to authorize the corporations of one state to enter within the borders of another state and construct railways and telegraph lines in its different counties for the transaction of local business. The grant to the complainant in no way interferes with the power of congress, if it possess such power, to construct telegraph lines or railways for postal service or for military purposes, or with its power to regulate commerce between the states. The imputation that Florida designed by the grant to obstruct the powers of congress in these respects is not warranted by anything in her statute. A like imputation, and with equal justice, might be made against every state in the Union which has authorized the construction of a railway or telegraph line in any one of its counties, with a grant of an exclusive right to operate the road or line for a limited period. It is true the United States, equally with their citizens, may be obliged in such cases to use the road or line; but it has not heretofore been supposed that this fact impaired the right of the state to make the grant. When the general government desires to transact business within a state, it necessarily makes use of the highways and modes of transit provided under the laws of the state, in the absence of those of its own creation.

§ 1050. *A corporation of one state cannot do business in another state without the consent of the latter.*

The position advanced, that if a corporation be in any way engaged in commerce it can enter and do business in another state without the latter's consent, is novel and startling. There is nothing in the opinion in *Paul v. Virginia* which gives any support to it. The statute of Virginia, which was under consideration in that case, provided that no insurance company not incorporated under its laws should do business within the state, without previously obtaining a license for that purpose; and that it should not receive such license until it had deposited with the treasurer of the state bonds of a specified character to an amount varying from \$30,000 to \$50,000. No such deposit was required of insurance companies incorporated by the state for carrying on their business within it; and in that case the validity of the discriminating provisions of the statute, between the corporations of the state and those of other states, was assailed. It was contended, among other things, that the statute was in conflict with the power vested in congress to regulate commerce among the several states; that the power included commerce carried on by corporations as well as that carried on by individuals; and that the issuing of a policy of insurance upon property in one state by a corporation of another state was a transaction

of interstate commerce. The court replied, that it was true that the language of the grant to congress made no reference to the instrumentalities by which commerce might be carried on; that it was general, and included alike commerce by individuals, partnerships, associations and corporations; and that, therefore, there was nothing in the fact that the insurance companies of New York were corporations, which impaired the argument of counsel, but that its defect lay in the character of the business; that issuing a policy of insurance was not a transaction of commerce; that the policies were mere contracts of indemnity against loss by fire, and not articles of commerce in any proper meaning of the term. In other words, the court held that the power of congress to regulate commerce was not affected by the fact that such commerce was carried on by corporations, but that a contract of insurance made by a corporation of one state upon property in another state was not a transaction of interstate commerce. It would have been outside of the case for the court to have expressed an opinion as to the power of congress to authorize a foreign corporation to do business in a state, upon the assumption that issuing a policy of insurance was a commercial transaction. And it is impossible to see any bearing of the views, which were expressed, upon the doctrine advanced here, that a corporation of one state, in any way engaged in commerce, can enter another state and do business there without the latter's consent. Let this doctrine be once established, and the greater part of the trade and commerce of every state will soon be carried on by corporations created without it. The business of the country is to a large extent conducted or controlled by corporations; and it may be, as was said by this court in the case referred to, "of the highest public interest that the number of corporations in the state should be limited, that they should be required to give publicity to their transactions, to submit their affairs to proper examination, to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal." All these guards against corporate abuses the state would be incapable of taking against a corporation of another state operating a railway or a telegraph line within its borders under the permission of congress, however extortionate its charges or corrupt its management. The corporation might have a tariff of rates and charges prescribed by its charter, which would be beyond the control of the state; and thus, by the authority of congress, a state might be reduced to the condition of having the rates of charges for transportation of persons and freight and messages within its borders regulated by another state. Indeed, it is easy to see that there will remain little of value in the reserved rights of the states, if the doctrine announced in this case be accepted as the law of the land.

§ 1051. *Congress cannot regulate commerce carried on wholly within one state.*

The power vested in congress to regulate commerce "among the several states" does not authorize any interference with the commerce which is carried on entirely within a state. "Comprehensive as the word 'among' is," says Chief Justice Marshall, "it may very properly be restricted to that commerce which concerns more states than one;" and "the completely internal commerce of a state, then, may be considered as reserved for the state itself." *Gibbons v. Ogden*, 9 Wheat., 194 (§§ 1183-1201, *infra*). That commerce embraces the greater part of the business of every state. Every one engaged

in the transportation of property or persons, or in sending messages, between different points within the state, not destined to points beyond it, or in the purchase or sale of merchandise within its borders, is engaged in its commerce; and the doctrine that congress can authorize foreign corporations to enter within its limits and participate in this commerce without the state's consent is utterly subversive of our system of local state government. State control in local matters would thus be impossible.

The late war was carried on at an enormous cost of life and property, that the Union might be preserved; but, unless the independence of the states within their proper spheres be also preserved, the Union is valueless. In our form of government, the one is as essential as the other; and a blow at one strikes both. The general government was formed for national purposes, principally that we might have within ourselves uniformity of commercial regulations, a common currency, one postal system, and that the citizens of the several states might have in each equality of right and privilege; and that in our foreign relations we might present ourselves as one nation. But the protection and enforcement of private rights of both persons and property, and the regulation of domestic affairs, were left chiefly with the states; and, unless they are allowed to remain there, it will be impossible for a country of such vast dimensions as ours—with every variety of soil and climate, creating different pursuits, and conflicting interests in different sections—to be kept together in peace. As long as the general government confines itself to its great but limited sphere, and the states are left to control their domestic affairs and business, there can be no ground for public unrest and disturbance. Disquiet can only arise from the exercise of ungranted powers. Over no subject is it more important for the interests and welfare of a state that it should have control, than over corporations doing business within its limits. By the decision now rendered, congressional legislation can take this control from the state, and even thrust within its borders corporations of other states in no way responsible to it. It seems to me that, in this instance, the court has departed from long-established doctrines, the enforcement of which is of vital importance to the efficient and harmonious working of our national and state governments.

MR. JUSTICE HUNT dissented on the ground that the act of congress was intended only to apply to telegraph lines constructed upon the public domain.

PAUL v. VIRGINIA.

(8 Wallace, 169-185. 1868.)

ERROR to the Supreme Court of Appeals of Virginia.

STATEMENT OF FACTS.—Paul, a citizen of Virginia, was agent for New York insurance companies, and applied for a license to issue policies, etc., as required by the state statute. He refused, however, to deposit bonds, as required, with the treasurer, and for this refusal alone the license was denied to him. He proceeded to do business as insurance agent without the license, was indicted and fined, and the case comes to this court by writ of error.

§ 1052. *Corporations are not citizens within the clause of the constitution that secures to the citizens of each state all the privileges of citizens in the several states.*

Opinion by MR. JUSTICE FIELD.

On the trial in the court below the validity of the discriminating provisions of the statute of Virginia between her own corporations and corporations of

other states was assailed. It was contended that the statute in this particular was in conflict with that clause of the constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and the clause which declares that congress shall have power "to regulate commerce with foreign nations and among the several states." The same grounds are urged in this court for the reversal of the judgment.

The answer which readily occurs to the objection founded upon the first clause consists in the fact that corporations are not citizens within its meaning. The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the state, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed. It is true that it has been held that where contracts or rights of property are to be enforced by or against corporations, the courts of the United States will, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the state under the laws of which it is created, and to this extent will treat a corporation as a citizen within the clause of the constitution extending the judicial power of the United States to controversies between citizens of different states. In the early cases, when this question of the right of corporations to litigate in the courts of the United States was considered, it was held that the right depended upon the citizenship of the members of the corporation, and its proper averment in the pleadings. Thus, in the case of *Hope Ins. Co. v. Boardman*, 5 Cranch, 57, where the company was described in the declaration as "a company legally incorporated by the legislature of the state of Rhode Island and Providence Plantations, and established at Providence," the judgment was reversed because there was no averment that the members of the corporation were citizens of Rhode Island, the court holding that an aggregate corporation, as such, was not a citizen within the meaning of the constitution. In later cases this ruling was modified, and it was held that the members of a corporation would be presumed to be citizens of the state in which the corporation was created, and where alone it had any legal existence, without any special averment of such citizenship, the averment of the place of creation and business of the corporation being sufficient; and that such presumption could not be controverted for the purpose of defeating the jurisdiction of the court. *Louisville R. Co. v. Letson*, 2 How., 497; *Marshall v. Baltimore & Ohio R. Co.*, 16 id., 314; *Covington Drawbridge Co. v. Shepherd*, 20 id., 233; and *Ohio & Mississippi R. Co. v. Wheeler*, 1 Black., 297.

§ 1053. *The only rights a corporation can claim are the rights that are given to it in that character, not the rights of its members as citizens.*

But in no case which has come under our observation, either in the state or federal courts, has a corporation been considered a citizen within the meaning of that provision of the constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. In *Bank of Augusta v. Earle*, 13 Pet., 586 (CORPORATIONS, §§ 1123-35), the question arose whether a bank, incorporated by the laws of Georgia, with a power, among other things, to purchase bills of exchange, could lawfully exercise that power in the state of Alabama; and it was contended, as in the case at bar, that a corporation, composed of citizens of other states, was entitled to the benefit of that provision, and that the court should look beyond the act of incorporation and see who were its members, for the purpose of affording them its protection, if found to be citizens of other states, reference

being made to an early decision upon the right of corporations to litigate in the federal courts in support of the position. But the court, after expressing approval of the decision referred to (*Bank of United States v. Deveaux*, 5 Cranch, 61), observed that the decision was confined in express terms to a question of jurisdiction; that the principle had never been carried further, and that it had never been supposed to extend to contracts made by a corporation, especially in another sovereignty from that of its creation; that if the principle were held to embrace contracts, and the members of a corporation were to be regarded as individuals carrying on business in the corporate name, and therefore entitled to the privileges of citizens, they must at the same time take upon themselves the liabilities of citizens and be bound by their contracts in like manner; that the result would be to make the corporation a mere partnership in business with the individual liability of each stockholder for all the debts of the corporation; that the clause of the constitution could never have intended to give citizens of each state the privileges of citizens in the several states, and at the same time to exempt them from the liabilities attendant upon the exercise of such privileges in those states; that this would be to give the citizens of other states higher and greater privileges than are enjoyed by citizens of the state itself, and would deprive each state of all control over the extent of corporate franchises proper to be granted therein. "It is impossible," continued the court, "upon any sound principle, to give such a construction to the article in question. Whenever a corporation makes a contract it is the contract of the legal entity, the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state."

§ 1054. — *objects and effect of the clause of the constitution in question.*

It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the constitution has tended so strongly to constitute the citizens of the United States one people as this. *Lemmon v. People*, 20 N. Y., 607. Indeed, without some provision of the kind removing from the citizens of each state the disabilities of alienage in the other states, and giving them equality of privilege with citizens of those states, the republic would have constituted little more than a league of states; it would not have constituted the Union which now exists.

§ 1055. — *the privileges secured by that clause are the common, not the special, privileges of citizens.*

But the privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any opera-

tion in other states. They can have no such operation, except by the permission, express or implied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other states to their enjoyment therein be given.

§ 1056. *The corporations of one state are recognized by other states only by comity.*

Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, "It must dwell in the place of its creation, and cannot migrate to another sovereignty." The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

If, on the other hand, the provision of the constitution could be construed to secure to citizens of each state in other states the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the states. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital or the union of large numbers that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those states would soon pass into their hands. The principal business of every state would in fact be controlled by corporations created by other states.

§ 1057. *Each state has a right to permit or refuse to corporations of other states the privilege of doing business within its borders.*

If the right asserted of the foreign corporation, when composed of citizens of one state, to transact business in other states were even restricted to such business as corporations of those states were authorized to transact, it would still follow that those states would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other states to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the state should be

limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal. "It is impossible," to repeat the language of this court in *Bank of Augusta v. Earle*, "upon any sound principle, to give such a construction to the article in question"—a construction which would lead to results like these.

§ 1058. *The commerce which congress has the right to regulate includes the commerce of corporations.*

We proceed to the second objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the constitution. It is undoubtedly true, as stated by counsel, that the power conferred upon congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. At the time of the formation of the constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce of individuals, partnerships, associations and corporations.

§ 1059. *The business of insurance companies is not commerce.*

There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.

In *Nathan v. Louisiana*, 8 How., 73 (§§ 1035-37, *supra*), this court held that a law of that state imposing a tax on money and exchange brokers, who dealt entirely in the purchase and sale of foreign bills of exchange, was not in conflict with the constitutional power of congress to regulate commerce. The individual thus using his money and credit, said the court, "is not engaged in commerce, but in supplying an instrument of commerce. He is less connected

with it than the ship-builder, without whose labor foreign commerce could not be carried on." And the opinion shows that, although instruments of commerce, they are the subjects of state regulation, and, inferentially, that they may be subjects of direct state taxation.

"In determining," said the court, "on the nature and effect of a contract, we look to the *lex loci* where it was made, or where it was to be performed. And bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the states have adopted the law merchant, others have not. The time within which a demand must be made on a bill, a protest entered and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different states. These laws, in various forms and in numerous cases, have been sanctioned by this court." And again: "For the purposes of revenue the federal government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now, the federal government can no more regulate the commerce of a state than a state can regulate the commerce of the federal government; and domestic bills or promissory notes are as necessary to the commerce of a state as foreign bills to the commerce of the Union. And if a tax on an exchange broker who deals in foreign bills be a regulation of foreign commerce, or commerce among the states, much more would a tax upon state paper, by congress, be a tax on the commerce of a state."

If foreign bills of exchange may thus be the subject of state regulation, much more so may contracts of insurance against loss by fire. We perceive nothing in the statute of Virginia which conflicts with the constitution of the United States; and the judgment of the supreme court of appeals of that state must, therefore, be affirmed.

#### RAILROAD COMPANY *v.* RICHMOND.

(19 Wallace, 584-590. 1873.)

ERROR to the Supreme Court of Iowa.

STATEMENT OF FACTS.—The Dubuque & Sioux City Railroad Company and the Dubuque Elevator Company entered into a contract by which it was agreed that the latter should erect a building, and should receive, store, deliver and handle all through grain shipped by the former company, at certain specified rates, etc. The railroad company on its part agreed that the elevator company should have the handling of all through grain, etc. The Illinois Central Railroad Company leased the Dubuque & Sioux City Railroad, and refused to perform the stipulations of the contract. The grounds of the refusal are stated in the opinion.

Opinion by MR. JUSTICE FIELD.

There is no question about the power of the Dubuque & Sioux City Railroad Company to make the contract in controversy with the elevator company; and if there were any, it would not be one within our province, upon the present appeal, to decide. The railroad company was obliged to discharge the grain it carried in its cars at the terminus of its road; and in securing the use of an elevator it provided the least expensive and the most expeditious mode for that purpose. The period for which the contract should be made, like other contracts for service, was one which rested in the discretion of the companies. No rule of law limited the period of its continuance. The occurrence of subse-



quent events, rendering it of more or less value to either of the parties, could not affect its validity or justify any violation of its provisions.

The plaintiffs in error contend — we quote their own language — “that the contract sued on in this action is repugnant to the commercial power of congress, as exercised in the passage of the acts of June 15, 1866, and July 25, 1866, and in contravention of the public policy established thereby.” The act of congress of June 15, 1866, authorized every railroad company in the United States, whose road was operated by steam, and its successors and assigns, to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property, on their way from one state to another state, and to receive compensation therefor, and to connect with roads of other states so far as to form continuous lines for the transportation of the same to their place of destination. The act of July 25, 1866, authorized the construction of certain bridges over the Mississippi river, and among others a bridge connecting Dubuque with Dunleith, in the state of Illinois, and provided that the bridges, when constructed, should be free for the crossing of all trains of railroads terminating on either side of the river, for reasonable compensation. These acts were passed under the power vested in congress to regulate commerce among the several states, and were designed to remove trammels upon transportation between different states which had previously existed, and to prevent the creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi. But they were intended to reach trammels interposed by state enactments or by existing laws of congress. They were not intended, even if it were competent for congress to authorize any such proceeding, to invade the domain of private contracts, and annul all such as has been made on the basis of existing legislation and existing means of interstate communication.

**§ 1060.** *Contracts valid when made continue valid.*

Contracts valid when made continue valid and capable of enforcement, so long, at least, as peace lasts between the governments of the contracting parties, notwithstanding a change in the conditions of business which originally led to their creation.

**§ 1061.** *Object of the commercial clause in the constitution.*

The power to regulate commerce among the several states was vested in congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation; it was never intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse. The argument of the plaintiffs in error would lead to the abrogation of all contracts of the Iowa Railroad Company which might prove from subsequent events to be more onerous than contracts made after such events had happened. A contract, for example, for the supply of coal for the engines of the company, made upon terms which were at the time reasonable, might be felt to be very hard and oppressive if, before its termination, the discovery of new fields of coal in the vicinity of the road should reduce the market price of the article one-half. To assert that the enforcement of a contract of this kind would be repugnant to the commercial power of congress, because the expenses of transportation would be less if the contract were annulled, would not be more extraordinary than the position assumed by the appellant in the present case, and would be equally entitled to consideration.

When counsel speaks of the public policy established by the acts of congress mentioned, he must mean nothing more than that the acts were intended to facilitate commercial intercourse among the states. Undoubtedly, such was the case, and it is of great public interest that such intercourse should be free and untrammelled. But if comparisons may be made with respect to a subject of this nature, we should say that the observance of good faith between parties, and the upholding of private contracts, and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequences.

*Decree affirmed.*

RAILROAD COMPANY *v.* HUSEN.

(5 Otto, 465-474. 1877.)

ERROR to the Supreme Court of Missouri.

STATEMENT OF FACTS.—Husen sued the railroad company for damages inflicted upon him by their violation of an act of the Missouri legislature prohibiting the importation of Texas, Mexican or Indian cattle. The defense was that the law was repugnant to the constitution of the United States. There was judgment for the plaintiff.

Opinion by MR. JUSTICE STRONG.

Five assignments of error appear in this record; but they raise only a single question. It is, whether the statute of Missouri, upon which the action in the state court was founded, is in conflict with the clause of the constitution of the United States that ordains "congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The statute, approved January 23, 1872, by its first section, enacted as follows: "No Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into, or remain, in any county in this state, between the 1st day of March and the 1st day of November in each year, by any person or persons whatsoever." A later section is in these words: "If any person or persons shall bring into this state any Texas, Mexican or Indian cattle, in violation of the first section of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle." Other sections make such bringing of cattle into the state a criminal offense, and provide penalties for it. It was, however, upon the provisions we have quoted that this action was brought against the railroad company that had conveyed the cattle into the county. It is noticeable that the statute interposes a direct prohibition against the introduction into the state of all Texas, Mexican or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not. It is true a proviso to the first section enacts that "when such cattle shall come across the line of the state, loaded upon a railroad car or steamboat, and shall pass through the state without being unloaded, such shall not be construed as prohibited by the act; but the railroad company or owners of a steamboat performing such transportation shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of transportation; and the existence of such disease along the line of such route shall be *prima facie* evidence that such disease has been communicated by such transportation." This proviso imposes burdens and liabilities for transportation through the state, though the cattle be not unloaded, while the body of the section

absolutely prohibits the introduction of any such cattle into the state, with the single exception mentioned.

§ 1062. *The states have no power to regulate interstate commerce.*

It seems hardly necessary to argue at length, that, unless the statute can be justified as a legitimate exercise of the police power of the state, it is a usurpation of the power vested exclusively in congress. It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the constitution of the United States to congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one state to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it.

§ 1063. *A law excluding from the state during two-thirds of the year any cattle coming from another state or country is a regulation of commerce and void.*

The Missouri statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power,—that of destruction. It meets at the borders of the state a large and common subject of commerce, and prohibits its crossing the state line during two-thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the state without being unloaded. But even the right of steamboat owners and railroad companies to transport such property through the state is loaded by the law with onerous liabilities, because of their agency in the transportation. The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one state and that of citizens of other states. This court has heretofore said that interstate transportation of passengers is beyond the reach of a state legislature. And if, as we have held, state taxation of persons passing from one state to another, or a state tax upon interstate transportation of passengers, is prohibited by the constitution because a burden upon it, *a fortiori*, if possible, is a state tax upon the carriage of merchandise from state to state. Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation. *Case of State Freight Tax*, 15 Wall., 232 (§§ 1255-62, *infra*); *Ward v. Maryland*, 12 id., 418 (§§ 825-823, *supra*); *Welton v. State of Missouri*, 91 U. S., 275 (§§ 1379-83, *infra*); *Henderson v. Mayor of City of New York*, 92 id., 259 (§§ 1336-42, *infra*); *Chy Lung v. Freeman*, id., 275 (§§ 1343-44, *infra*). The two latter of these cases refer to obstructions against the admission of persons into a state, but the principles asserted are equally applicable to all subjects of commerce.

§ 1064. *The states have police power. What is police power. It cannot be exercised on a subject confided exclusively to congress.*

We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the state. We admit that the deposit in congress of the power to regulate foreign commerce, and commerce among the states, was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. As was said in *Thorpe v. Rutland & Burlington*

R. Co., 27 Vt., 149, "it extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state. According to the maxim, *sic utere tuo ut alienum non lædas*, which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." It was further said that, by the general police power of a state, "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned." It may also be admitted that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in *The Passenger Cases*, 7 How., 283 (§§ 1234-1335, *infra*), by Mr. Justice Grier, in the sacred law of self-defense. *Vide* 3 Sawyer, 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive.

But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to congress by the federal constitution. It cannot invade the domain of the national government. It was said in *Henderson v. Mayor of City of New York*, *supra*, to "be clear, from the nature of our complex form of government, that whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the states." Substantially the same thing was said by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *infra*). Neither the unlimited powers of a state to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon congress by the constitution. Many acts of a state may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule for conduct. There is no such difficulty in the present case. While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Upon this subject the cases in 92 U. S., to which we have referred, are very instructive. In *Henderson v. The Mayor*, etc., the stat-

ute of New York was defended as a police regulation to protect the state against the influx of foreign paupers; but it was held to be unconstitutional, because its practical result was to impose a burden upon all passengers from foreign countries. And it was laid down that, "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of congress. So in the case of *Chy Lung v. Freeman*, where the pretense was the exclusion of lewd women; but as the statute was more far-reaching and affected other immigrants, not of any class which the state could lawfully exclude, we held it unconstitutional. Neither of these cases denied the right of a state to protect herself against paupers, convicted criminals, or lewd women, by necessary and proper laws, in the absence of legislation by congress, but it was ruled that the right could only arise from vital necessity and that it could not be carried beyond the scope of that necessity. These cases, it is true, speak only of laws affecting the entrance of persons into a state; but the constitutional doctrines they maintain are equally applicable to interstate transportation of property. They deny validity to any state legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the federal government.

§ 1065. *A law prohibiting the importation of cattle is not a quarantine or inspection law, nor otherwise within the police powers of the state. Such a law is repugnant to the constitution of the United States.*

Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, "You shall not bring into the state any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities." Such a statute, we do not doubt, it is beyond the power of a state to enact. To hold otherwise would be to ignore one of the leading objects which the constitution of the United States was designed to secure. In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. *Yeazel v. Alexander*, 58 Ill., 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature and not for the courts. With this we cannot concur. The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution. And as its range sometimes comes very near to the field committed by the constitution to congress, it is the duty of the courts to guard vigilantly against any needless intrusion.

Judgment reversed, and the record remanded with instructions to reverse the judgment of the circuit court of Grundy county, and to direct that court to award a new trial.

§ 1066. **Power of congress exclusive.**—The power to regulate commerce with foreign nations and among the states is vested exclusively in congress. *Passenger Cases*, 7 How., 283 (§§ 1284-1835); *Hall v. De Cuir*, 5 Otto, 485 (§§ 1140-63).

§ 1067. Whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they are within the exclusive legislative power of congress. *Case of the State Freight Tax*, 15 Wall., 232 (§§ 1255-62).

§ 1068. The United States, under the constitution, is a sovereignty as to the objects surrendered and specified, limited only by the qualifications and restrictions expressed in the constitution. The power of the United States, as far as commerce is concerned, is sovereign, qualified by the limitations expressed in the constitution. *United States v. The Brigantine William*, \*2 Hall L. J., 272.

§ 1069. The paramount authority of an act of congress, relative to commerce between the states, is not wholly conferred by the constitution itself, but is the logical result of the power over the subject-matter conferred upon that body by the states. They surrendered this power to the general government; and to the extent of a fair exercise of it by congress the act must be supreme. *Sinnot v. Commissioners of Pilotage of Mobile*, 22 How., 243.

§ 1070. It seems that the power of congress to regulate commerce among the states is limited by other provisions of the constitution, by the nature of the power and the sovereignty of the states. *United States v. Cisna*, 1 McL., 261.

§ 1071. **Regulations by congress are exclusive.**—When congress exercises the power to regulate commerce, either with foreign nations or among the states, all conflicting state laws must give way. *Hinson v. Lott*, \*8 Wall., 148.

§ 1072. **Commerce between two or more states.**—Under the constitution congress has power to regulate commerce "among the states," and this latter phrase limits the power of congress in the regulation of commerce to two or more states. Consequently a state has power to regulate a commerce exclusively within its own limits, but beyond such limits the regulation belongs to congress. Admiralty and maritime jurisdiction is essentially a commercial power, and it is necessarily limited to the exercise of that power by congress. Every voyage of a vessel between two or more states is subject to admiralty jurisdiction, and not to any state regulation. (Per McLEAN, J.) *The Steamboat Magnolia*, 20 How., 304; *Halderman v. Beckwith*, 4 McL., 293.

§ 1073. Railroads incorporated in different states and engaged in the business of transporting passengers and freight from one state to another, or through more than one state, are instruments of commerce, and the power of congress to regulate commerce embraces them. *Sweatt v. Boston, etc., R'y Co.*, 3 Cliff., 347.

§ 1074. **Failure of congress to legislate.**—The inaction of congress on the subject of interstate commerce, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled. *Welton v. State of Missouri*, 1 Otto, 275 (§§ 1379-83).

§ 1075. It seems that the constitutional provision that congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," is not *per se*, and without any exercise of that power by congress, an absolute inhibition of all state legislation which may interfere with or affect the foreign and interstate commerce of the United States. It is settled by the supreme court that a state may have an undoubted right to pass many laws which have incidentally not only a remote, but an immediate and very considerable, influence upon commerce among the states. Of this class are police regulations, health laws, inspection laws, quarantine laws, etc., as well as those affecting internal commerce, such as laws relating to roads, ferries, etc. And even if the power given congress was thus exclusive, it would seem that the states would retain power to legislate upon these subjects, and that such legislation, if a legitimate exercise of such power, would be beyond the control of the federal courts. (Per HALL, J.) *Silliman v. Hudson River Bridge Co.*, 4 Blatch., 402; *Sherlock v. Alling*, 3 Otto, 100.

§ 1076. **Preference to ports of one state.**—A state law regulating charges by warehousemen is not objectionable as giving preference to the ports of one state over those of another. *Munn v. Illinois*, 4 Otto, 113 (§§ 1349-67).

§ 1077. The prohibition of legislation by congress giving one port preference over another port was intended only to prevent legislation directly giving such preference, not laws giving

incidental advantages to one port not enjoyed by another. *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How., 421 (§§ 1203-12).

§ 1078. **Police power of the states.**—In conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of its citizens, though the regulation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the constitution. General legislation prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. *Sherlock v. Alling*, 3 Otto, 103; *Steamship Co. v. Portwardens*, 6 Wall., 81 (§§ 1535-38); *The Steamboat New York*, 18 How., 226. See §§ 266, 298, 315, 318, 1038.

§ 1079. The statute of the state of New York authorizing the summary removal of persons, other than Indians, settling or residing upon lands occupied by any nation or tribe of Indians within the state, is a police regulation of the state, calculated to protect the Indians and preserve the peace, and is constitutional. The power of a state to make such regulations to preserve the peace of the community is absolute, and has never been surrendered. *State of New York v. Dibble*, 21 How., 370.

§ 1080. **Commerce with Indians.**—Under the constitution and the treaty between the United States and the Cherokee Indians, the right to regulate the entire intercourse between the United States and that nation of Indians is vested in the government of the United States, and a law of Georgia assuming control over such Indian country is invalid. *Worcester v. State of Georgia*, 6 Pet., 561.

§ 1081. Under that clause of the constitution giving congress the power to regulate commerce among the Indian tribes, the sale of liquor may be forbidden by it, not only in the Indian country but in localities adjacent thereto. *United States v. Forty-three Gallons of Whisky*, 3 Otto, 193; *United States v. Holliday*, 3 Wall., 407.

§ 1082. The decision of the executive and other political departments of the government, that a particular class of Indians constitute a tribe, will be followed by the courts in deciding whether such Indians are within the control of the laws of congress for certain purposes, under the constitutional authority to regulate commerce with the Indian tribes. *United States v. Holliday*, 3 Wall., 407.

§ 1083. **Regulating navigation and trade.**—Under the clause of the constitution empowering congress to regulate commerce, it seems that congress may legislate over navigation as well as trade—over intercourse as well as traffic. It has also power to prescribe what shall constitute American vessels, and the national character of the seamen who shall navigate them, and it may likewise prescribe rules and regulations for the intercourse and navigation of such vessels between the different states. But this constitutional grant of power does not confer upon congress the authority to extend its legislation throughout the entire sphere of legislation of the several states. This power of congress is not operative upon persons and things upon land within the boundaries of state jurisdiction, and the right and duties of persons in relation to property are rightfully prescribed and controlled by the laws of the state within whose territorial limits it is found. The powers reserved to the several states extend to all the objects which, in the ordinary course of affairs, concern property and the rights of property of individuals as well as to the internal order, improvement and prosperity of the state. *King v. American Transportation Company*, 1 Flip., 6.

§ 1084. Power to regulate commerce includes the power to regulate navigation, and this power is exclusive in congress. *The Barque Chusan*, 2 Story, 455; *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201); *The Brig Wilson*, 1 Marsh., 430.

§ 1085. The power over navigation and intercourse is part of the power to regulate commerce, and is possessed by congress as fully as it possesses the power to regulate commerce, but not to a greater extent. There is no separate and distinct grant to regulate navigation and intercourse. Wherever the right to regulate commerce does not extend, the right to regulate navigation and intercourse does not go. The latter goes with the former and follows it. The right to regulate commerce extends to foreign commerce, commerce with the Indian tribes, and commerce between the states. It does not include the purely internal commerce of a state. Commerce, to be subject to such regulations, must be among, that is, intermingled with, the several states. If confined to one state alone, congress has no control over it. So a commercial regulation as to the licensing of steamboats conveying passengers does not apply to a ferry boat confined to the waters of one state. *United States v. The Steamboat James Morrison*, Newb., 243; *United States v. The Steam Ferry Boat Wm. Pope*, id., 257.

§ 1086. **Vesting jurisdiction in the courts in certain cases.**—A law of congress giving jurisdiction to courts of the United States in certain cases is not a regulation of commerce. Though the act may give the courts jurisdiction to a certain extent over commerce and navi-

gation, and authorize the court to expound the laws which regulate them, still it is not a regulation of commerce within the meaning of the constitution. The law merely creates a tribunal to carry the laws into effect, but does not prescribe them. *The Propeller, Genesee Chief v. Fitzhugh*, 12 How., 452.

§ 1087. *Passenger traffic between states.*—An act of the legislature abrogating the common law right of action for wrongful exclusion from railroad cars on roads running between two or more states is unconstitutional. *Brown v. Memphis & C. R'y Co.*, 5 Fed. R., 501. See §§ 1111, 1119.

§ 1088. *Extent of the power of a state to make regulations governing vessels in its ports.*—The local authorities at a commercial port have a right to make such regulations for the convenience and safety of commerce as are necessary and indispensable, unless such regulations conflict with laws of congress in relation to commerce, or with the general admiralty jurisdiction of the federal courts. They have a right to prescribe at what wharf a vessel may lie, and how long she may remain there, where she may unload or take on board particular cargoes, where she may anchor in the harbor, and for what time, and what description of light she must display at night to warn the passing vessels of her position and that she is at anchor and not under sail. Such regulations are like local usages of navigation in different ports, and every vessel, from whatever port of the world she may come, is bound to take notice of them and conform to them. *The General Clinch*, 21 How., 187.

§ 1089. *Action for causing death.*—The statute of Indiana, providing that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, in cases where the former would have had an action for such omission or wrongful act if he had lived, when extended to persons engaged in foreign or interstate commerce upon the Ohio river, is no infringement of the commercial power of congress. *Sherlock v. Alling*, 3 Otto, 101; 15 Alb. L. J., 78.

§ 1090. *Regulating ferries.*—A vessel licensed and enrolled for the coasting trade has an undoubted right to land at all the regular and customary landing places on a navigable river of the United States, but it acquires no right thereby to interfere with the exclusive right acquired by a party from another state of keeping a ferry across the river between two states, and an injunction from a state court against such interference is not in violation of the right of congress to regulate commerce between the states, nor does it violate any right conferred by the enrollment and license. *Conway v. Taylor*, 1 Black., 632.

§ 1091. *Oyster beds.*—A law prohibiting persons not citizens of the state from planting oysters in the tide-waters of the state is not a regulation of commerce. *McCready v. Virginia*, 4 Otto, 391 (§§ 821-824). See §§ 749, 842, 1091.

§ 1092. A law of Maryland, forbidding the use of certain instruments in taking oysters within the waters of the state, and imposing a forfeiture upon vessels engaged in taking oysters with the forbidden instruments, is not unconstitutional as repugnant to the clause of the constitution which confers upon congress the power to regulate commerce. The fisheries of a state within its boundaries, or on its borders, are within its jurisdiction, and the state may protect them by legislation; and the fact that a vessel was licensed and enrolled for the coasting trade will not prevent its seizure for violation of the police and internal regulations of the state. Nor is it in violation of the section conferring exclusive admiralty jurisdiction on the federal courts. *Smith v. State of Maryland*, 18 How., 73; *Corfield v. Coryell*,\* 4 Wash., 371.

§ 1093. The act of the legislature of New Jersey of June 9, 1820, declaring that from May to September, in every year, no person shall rake any oyster bed in the state, or gather any oysters on any banks or beds within the same, under penalty of \$10; that no person shall at any time dredge for oysters in any of the rivers, bays or waters of the state, under penalty of \$50; that it shall not be lawful for any person, who is not an inhabitant and resident of the state, to gather oysters in any of the rivers, bays or waters in the state, on board of any vessel not wholly owned by some person inhabitant of or residing in the state, and every person so offending shall forfeit \$10, and also the vessel employed, with all the oysters, rakes, etc., belonging to the same; and that it shall be lawful for any person to seize such vessel, and to give information to two justices of the county, who are to try and determine the case, and in case of condemnation to order the vessel to be sold, does not conflict with the commercial power of congress. Nor does this act violate that part of the constitution which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. *Corfield v. Coryell*,\* 4 Wash., 371.

§ 1094. *Recording mortgages on vessels.*—The act of congress of July 29, 1850, enacting that "no bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, of the United States, shall be valid as against any other person than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the collector of



customs where such vessel is registered or enrolled," is held to be constitutional. *White's Bank v. Smith*, 7 Wall., 648.

§ 1095. **Prohibiting introduction of slaves.**—The provision of the constitution of the United States which gives congress the power to regulate commerce does not interfere with the right of the several states to prohibit the introduction of slaves within their borders as merchandise or for sale. *Groves v. Slaughter*, 15 Pet., 504.

§ 1096. **State law requiring enrollment of vessel.**—A law of Alabama requiring the owners of vessels to file with the probate court of Mobile, before they should leave that port, a statement of the name of the vessel and of the owners and their place of residence, and also of their respective interests, and imposing a fine for failure to do so, is unconstitutional as to vessels engaged in the coasting trade and licensed therefor according to act of congress. The law is directly repugnant to the act of congress regulating the coasting trade, and is therefore void. The whole commercial marine of the country is placed by the constitution under the control of congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, are, therefore, but the exercise of an undoubted power. When, therefore, the act of the legislature of a state prescribes a regulation on the subject repugnant to, and inconsistent with, the regulation of congress, the state law must give way, and this without regard to the source of power whence the state legislature derived its enactment, whether from its police power or otherwise. *Sinnot v. Commissioners of Pilotage of Mobile*, 22 How., 289; *Foster v. Commissioners of Pilotage of Mobile*, 22 How., 245.

§ 1097. **Regulating exhuming of dead bodies.**—The act of the legislature of California forbidding, under penalty, the exhuming of bodies of deceased persons, or the carrying of such exhumed bodies through the streets or highways, except upon a permit from the health officer, and requiring the payment of \$10 for every such permit, in order to defray the expenses of inspection and supervision, and excepting from its operation removal of bodies from one cemetery to another in the same county, but making no other exception or discrimination, is not in conflict with the power of congress to regulate foreign commerce when applied to bodies of Chinese disinterred for transportation to China. *In re Wong Yung Quy*,\* 6 Saw., 442.

§ 1098. **Prohibiting colored mariners from coming into the state.**—The statute of Louisiana of 1842, prohibiting free persons of color from coming into the state, as mariners on board any vessel, and requiring them to be imprisoned, and the master to give bonds to carry them outside the state, and compelling him to pay the expenses of the imprisonment, is void, as inconsistent with the regulations of commerce established by the laws of the United States pursuant to the authority expressly given by the constitution. *The Cynosure*,\* 1 Spr., 88; *Elkinson v. Delieesseline*,\* 2 Wheel. Cr. Cas., 56; *Roberts v. Yakes*,\* 16 Law Rep., 49; *The Ship William Jarvis*, 1 Spr., 435.

§ 1099. **Telegraphs—Taxation.**—A telegraph company is an instrument of commerce and subject to the regulating power of congress in respect to foreign and interstate commerce. The Western Union Telegraph Company, having lines extending through most of the states and territories, and having availed itself of the privileges, and subjected itself to the obligations, of title 65 of the Revised Statutes of the United States, relating to telegraph companies, and connected its lines with those owned by the government of the United States for public purposes, it cannot be subjected to taxation by a state on each message sent out of the state, or sent by public officers on the business of the United States. *Telegraph Co. v. Texas*, 15 Otto, 460. See § 1028.

§ 1100. **Pilots and pilotage.**—State laws on the subject of pilotage are constitutional. (*Ex parte McNiel*, 13 Wall., 286; *Cooley v. Board of Wardens*, 13 How., 299, cited.) *Wilson v. McNamee*,\* 12 Otto, 272. See § 1534.

§ 1101. The acts of the state of New York of April 15, 1847, March 12, 1860, March 14, 1863, April 16, 1868, and April 5, 1871, containing a system of pilotage regulations, and designed to secure the appointment of qualified pilots, and insure the faithful performance of their duties, provide for making appointments in a particular manner, require apprentices to serve a certain length of time before becoming licensed pilots, and provide that a pilot who first tenders his services may demand from the master of any vessel of one hundred tons burden and upwards, navigating Hell Gate, to whom the tender was made and by whom it was refused, half-pilotage, the amount to be ascertained according to the rules prescribed in the acts. It is held that although these provisions are regulations of commerce, they are not unconstitutional as inconsistent with the power of congress to regulate commerce, not being in conflict with any existing laws of congress on the subject. *Ex parte McNiel*, 13 Wall., 286.

§ 1102. The power in congress to regulate commerce, though embracing the subject of pilots and pilotage, is not exclusive of authority in the states to regulate pilots. The act of California of May 20, 1861, "to establish pilots and pilot regulations for the port of San Francisco," creating a board of pilot commissioners, and authorizing the board to license such

number of pilots for the port as it may deem necessary, and prescribing their duties, qualifications and compensation; making it a misdemeanor for any person, not having a license from the board, to pilot any vessel in or out of the port by way of the "Heads," that is, by the way that leads directly to and from the ocean; making all vessels and their masters and owners jointly and severally liable for pilotage fees; and declaring that when a vessel is spoken by a pilot and his services are refused, he shall be entitled to one-half pilotage fees, except when the vessel is in tow of a steam-tug outward bound, is not unconstitutional, not being in conflict with any regulation of congress on the subject. It is not in conflict with the act of congress of August 30, 1852. (MILLER, WAYNE and CLIFFORD, JJ., dissenting from this last proposition.) *Steamship Co. v. Joliffe*, 2 Wall., 450.

## 2. On Navigable Waters.

SUMMARY — *Compacts between states*, § 1103. — *Improving navigation of rivers*, §§ 1104, 1105. — *Mode of improvement left to discretion of officers*, § 1106. — *Commerce on high seas between ports of a state*, § 1107. — *Rivers wholly within a state*, §§ 1108, 1121. — *Navigable waters of the United States*, § 1109. — *Common-law rule as to navigability*, § 1110. — *State law requiring accommodations for colored passengers*, § 1111. — *Bridges and dams*, §§ 1112-1114, 1123. — *State may improve bays and harbors*, § 1115. — *Granting exclusive privilege to navigate waters of a state*, §§ 1116, 1121. — *Power to regulate navigation*, § 1117. — *Commerce with foreign powers and among the states*, § 1118. — *Vessels carrying passengers*, § 1119. — *The power by which vessels are moved is not material as regards the power of congress*, § 1120. — *Compact between Virginia and Kentucky as to Ohio river*, § 1122. — *Legalizing bridges after condemnation by decree of court*, § 1123. — *Legalizing a canal by adoption*, § 1124.

§ 1103. A compact between two states as to the navigation of a river, entered into before the states were admitted into the Union, is made in subordination to the power vested in congress to regulate commerce. *South Carolina v. Georgia*, §§ 1125-31. See §§ 1122, 1220.

§ 1104. The power to regulate commerce includes the power to improve the navigation of a river by removing obstructions, etc. And while certain structures may tend to impede the navigation of a river, still, if their tendency is to facilitate commerce, they are not unlawful. *Ibid.* See § 1225.

§ 1105. Congress, for the purpose of improving the navigation of a river, may confine the water to one of two channels. *Ibid.*

§ 1106. A law for the improvement of a harbor, which leaves the mode of improvement to the discretion of the secretary of war, is not objectionable. *Ibid.*

§ 1107. The power of congress to regulate commerce extends to commerce on the high seas between ports of the same state. *Lord v. Steamship Co.*, §§ 1132-33.

§ 1108. A vessel navigating a river entirely within the limits of a state, but transporting goods destined for other states, or goods brought from without and destined to places within that state, is engaged in interstate commerce. *The Daniel Ball*, §§ 1134-39.

§ 1109. Rivers are navigable waters of the United States within the acts of congress passed in pursuance of the power to regulate commerce, when they form in their ordinary condition, or by uniting with other waters, a continued highway, over which commerce may be carried on with other states or foreign countries. *Ibid.*

§ 1110. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, or any test at all, of the navigability of waters. *Ibid.*

§ 1111. A state law requiring all owners of public conveyances on land or water to extend the same privileges to passengers of color as to white passengers, is, so far as it applies to vessels enrolled and licensed under the laws of the United States, and engaged in the coasting trade between the states, a regulation of inter-state commerce, and, therefore, in conflict with the federal constitution. *Hall v. De Cuir*, §§ 1140-63.

§ 1112. A state may authorize the erection of a bridge across a navigable stream wholly within its own limits. But congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. *Gilman v. Philadelphia*, §§ 1164-70. See §§ 1222, 1230.

§ 1113. A state may authorize the erection of a dam across a navigable river wholly within the state, if congress has not acted on the subject. *Pound v. Turck*, §§ 1171-73.

§ 1114. In the absence of legislation on the subject by congress, a state may authorize the

erection of a dam across a creek in which the tide ebbs and flows. *Willson v. Blackbird Creek Marsh Co.*, §§ 1174-76.

§ 1115. A state may provide for the dredging and cutting of a channel in a bay and for the payment of the expense thereof by the county lying next the bay; such an act is not such a regulation of commerce as is prohibited by the constitution when not inhibited by congress. *County of Mobile v. Kimball*, §§ 1177-82.

§ 1116. The laws of New York, granting an exclusive privilege to navigate the waters of the state with vessels moved by steam, are void as against the laws of congress regulating the coasting trade. *Gibbons v. Ogden*, §§ 1183-1201.

§ 1117. Under the power to regulate commerce congress has power to regulate navigation. *Ibid.*

§ 1118. The power to regulate commerce among the states is restricted to that commerce which concerns more states than one. The power to regulate commerce with foreign powers embraces all foreign commerce, and does not stop at the jurisdictional lines of the states. *Ibid.*

§ 1119. The power to regulate commerce extends to vessels engaged in carrying passengers. *Ibid.*

§ 1120. It comprehends vessels moved by wind, steam or any other power. *Ibid.*

§ 1121. The state of Maine authorized the improvement of the navigation of the Penobscot river, and granted to the parties the exclusive right to use steamboats from a certain point on the river towards its source. Below the point specified there were falls and dams, and where these were located the river for a distance of several miles had never been navigable. *Held*, that the grant was not void as being in conflict with the power vested in congress to regulate commerce. *Veazie v. Moor*, § 1202.

§ 1122. The compact between Virginia and Kentucky at the time of the latter's admission into the Union, that the Ohio river should forever remain free to all citizens of the United States for navigation, although assented to by congress, merely bound those states and not congress; that body having no authority to surrender its constitutional power to regulate commerce. *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, §§ 1203-12. See §§ 1103, 1229.

§ 1123. Congress has the power, in the exercise of its authority to regulate commerce between the states, to legalize a bridge already constructed in contravention of its laws, and although the courts of the United States have decreed its removal as an obstruction erected in violation of such laws. The enactment of such confirmatory law had the effect of vacating such decrees, and in no wise infringed upon the judicial power. *Ibid.* See § 1230.

§ 1124. While a canal may have been at the outset constructed in such a manner that it resulted in such an injury to others as a court of equity would restrain, yet if, before action taken, congress expressly adopts such canal as one of the channels of interstate and foreign commerce, by appropriating money for its improvement, the power of the supreme court as a court of equity is gone, and it has no right to make any order in reference to the work done. *Wisconsin v. Duluth*, §§ 1213-14.

[NOTES.— See §§ 1215-1243.]

#### SOUTH CAROLINA v. GEORGIA.

(8 Otto, 4-14. 1876.)

##### Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.— We do not perceive that, in this suit, the state of South Carolina stands in any better position than that which she would occupy if the compact of 1787 between herself and Georgia had never been made. That compact defined the boundary between the two states as the most northern branch or stream of the river Savannah from the sea, or mouth of the stream, to the fork or confluence of the rivers then called Tugoloo and Keowee. The second article declared that the navigation of the river Savannah, at and from the bar and mouth, along the northeast side of Cockspur Island, and up the direct course of the main northern channel, along the northern side of Hutchinson's Island, opposite the town of Savannah, to the upper end of said island, and from thence up the bed or principal stream of the said river to the confluence of the rivers Tugoloo and Keowee, . . . should thenceforth be

equally free to the citizens of both states, and exempt from all duties, tolls, hinderance, interruption or molestation whatsoever, attempted to be enforced by one state on the citizens of the other. Undoubtedly this assured to the citizens of the two states the free and unobstructed navigation of the channel described, precisely the same right which they would have possessed had the original charters of the two provinces, Georgia and South Carolina, fixed the Savannah river as the boundary between them. It needed no compact to give to the citizens of adjoining states a right to the free and unobstructed navigation of a navigable river which was the boundary between them. But it matters not to this case how the right was acquired, whether under the compact or not, or what the extent of the right of South Carolina was in 1787. After the treaty between the two states was made, both the parties to it became members of the United States. Both adopted the federal constitution, and thereby joined in delegating to the general government the right to "regulate commerce with foreign nations and among the several states."

§ 1125. *A compact between two states regulating commerce, entered into before the adoption of the constitution, is subordinate to the provisions of that instrument on that subject.*

Whatever, therefore, may have been their rights in the navigation of the Savannah river before they entered the Union, either as between themselves or against others, they both agreed that congress might thereafter do everything which is within the power thus delegated. That the power to regulate interstate commerce, and commerce with foreign nations, conferred upon congress by the constitution, extends to the control of navigable rivers between states,—rivers that are accessible from other states, at least to the extent of improving their navigability,—has not been questioned during the argument, nor could it be with any show of reason. From an early period in the history of the government it has been so understood and determined. Prior to the adoption of the federal constitution the states of South Carolina and Georgia together had complete dominion over the navigation of the Savannah river. By mutual agreement they might have regulated it as they pleased. It was in their power to prescribe, not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and whether it might be navigated at all. They could have determined that all vessels passing up and down the stream should pursue a defined course, and that they should pass along one channel rather than another, where there were two. They had plenary authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions therein at their will. This will not be denied; but the power to "regulate commerce," conferred by the constitution upon congress, is that which previously existed in the states.

§ 1126. *Congress may exercise plenary authority over all navigable rivers.*

As was said in *Gilman v. Philadelphia*, 3 Wall., 724 (§§ 1164–70, *infra*), "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by congress. This necessarily includes the power to keep these open and free from any obstruction to their navigation interposed by the states, or otherwise; to remove such obstructions where they exist; and to provide, by such sanctions as they may

deem proper, against the occurrence of the evil and for the punishment of the offenders. For these purposes congress possesses all the powers which existed in the states before the adoption of the national constitution, and which have always existed in the parliament in England." Such has uniformly been the construction given to that clause of the constitution which confers upon congress the power to regulate commerce.

§ 1127. *The turning of the water of a river into one of two channels is not an obstruction of navigation.*

But it is insisted on behalf of the complainant, that, though congress may have the power to remove obstructions in the navigable waters of the United States, it has no right to authorize placing obstructions therein; that while it may improve navigation, it may not impede or destroy it. Were this conceded, it could not affect our judgment of the present case. The record exhibits that immediately above the city of Savannah the river is divided by Hutchinson's Island, and that there is a natural channel on each side of the island, both uniting at the head. The obstruction complained of is at the point of divergence of the two channels, and its purpose and probable effect are to improve the southern channel at the expense of the northern, by increasing the flow of the water through the former, thus increasing its depth and water-way, as also the scouring effects of the current. The action of the defendants is not, therefore, the destruction of the navigation of the river. True, it is obstructing the water-way of one of its channels, and compelling navigation to use the other channel; but it is a means employed to render navigation of the river more convenient—a mode of improvement not uncommon. The two channels are not two rivers, and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation. If it were, every structure erected in the bed of the river, whether in the channel or not, would be an obstruction. It might be a light-house erected on a submerged sand-bank, or a jetty pushed out into the stream to narrow the water-way, and increase the depth of water and the direction and the force of the current, or the pier of a bridge standing where vessels now pass, and where they can pass only at very high water. The impediments to navigation caused by such structures are, it is true, in one sense, obstructions to navigation; but, so far as they tend to facilitate commerce, it is not claimed that they are unlawful. In what respect, except in degree, do they differ from the acts and constructions of which the plaintiff complains? All of them are obstructions to the natural flow of the river, yet all, except the pier, are improvements to its navigability, and consequently they add new facilities to the conduct of commerce.

§ 1128. *To what extent congress may obstruct navigable rivers.*

It is not, however, to be conceded, that congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the power and rights of the several states, so far as control over interstate and foreign commerce is concerned, this is not to be doubted. Might not the states of South Carolina and Georgia, by mutual agreement, have constructed a dam across the cross-tides between Hutchinson and Argyle Islands, and thus have confined the navigation

of the Savannah river to the southern channel? Might they not have done this before they surrendered to the federal government a portion of their sovereignty? Might they not have constructed jetties or manipulated the river so that commerce could have been carried on exclusively through the southern channel, on the south side of Hutchinson's Island? It is not thought that these questions can be answered in the negative. Then why may not congress, succeeding, as it has done, to the authority of the states, do the same thing? Why may it not confine the navigation of the river to the channel south of Hutchinson's Island; and why is this not a regulation of commerce, if commerce includes navigation? We think it is such a regulation.

§ 1129. *What may be done under the power to regulate commerce. Preference to ports of a state.*

Upon this subject the case of *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How., 421 (§§ 1203-12, *infra*), is instructive. There it was ruled that the power of congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, *in the judgment of law*, an obstruction of navigation. It was, therefore, decided that an act of congress declaring a bridge over the Ohio river, which in fact did impede steamboat navigation, to be a lawful structure, and requiring the officers and crews of vessels navigating the river to regulate their vessels so as not to interfere with the elevation and construction of the bridge, was a legitimate exercise of the power of congress to regulate commerce. It was further ruled that the act was not in conflict with the provision of the constitution which declares that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another. The judgment in that case is, also, a sufficient answer to the claim made by the present complainant, that closing the channel on the South Carolina side of Hutchinson's Island is a preference given to the ports of Georgia forbidden by this clause of the constitution. It was there said that the prohibition of such a preference does not extend to acts which may directly benefit the ports of one state and only incidentally injuriously affect those of another, such as the improvement of rivers and harbors, the erection of light-houses, and other facilities of commerce. "It will not do," said the court, "to say that the exercise of an admitted power of congress conferred by the constitution is to be withheld, if it appears or can be shown that the effect and operation of the law may incidentally extend beyond the limitation of the power." The case of *The Clinton Bridge*, 10 Wall., 454, is in full accord with this decision. It asserts plainly the power of congress to declare what is and what is not an illegal obstruction in a navigable stream.

§ 1130. *In improving navigation congress may appropriately leave to the discretion of executive officers the regulation of details.*

The plaintiff next contends that if congress has the power to authorize the construction of the work in contemplation and in progress, whereby the water will be diverted from the northern into the southern channel of the river, no such authority has been given. With this we cannot concur. By an act of congress of June 23, 1874, an appropriation was made of \$50,000, to be expended under the direction of the secretary of war, for the repairs, preservation and completion of certain public works, and, *inter alia*, "for the improvement of the harbor of Savannah." The act of March 3, 1875, made an additional appropriation of \$70,000, "for the improvement of the harbor of

Savannah, Georgia." It is true that neither of these acts directed the manner in which these appropriations should be expended. The mode of improving the harbor was left to the discretion of the secretary of war, and the mode adopted under his supervision plainly tends to the improvement contemplated. We know judicially the fact that the harbor is the river in front of the city, and the case, as exhibited by the pleadings, reveals that the acts of which the plaintiff complains tend directly to increase the volume of water in the channel opposite the city, as well as the width of the water-way. Without relying at all upon the report of the engineers, which was before congress, and which recommended precisely what was done, we can come to no other conclusion than that the defendants are acting within the authority of the statutes, and that the structure at the cross-tides intended to divert the water from the northern channel into the southern is, in the judgment of the law, no illegal obstruction. The plaintiff, has, therefore, made no case sufficient to justify an injunction, even if the state is in a position to ask for it.

§ 1131. *Quere, whether a state can demand removal of nuisance in navigable river without showing special damage.*

But, in resting our judgment upon this ground, we are not to be understood as admitting that a state, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court. Upon that subject we express no opinion. It is sufficient for the present case to hold, as we do, that the acts of the defendants, of which South Carolina complains, are not unlawful, and consequently that there is no nuisance against which an injunction should be granted. The special injunction heretofore ordered is dissolved, and the bill dismissed.

#### LORD v. STEAMSHIP COMPANY.

(12 Otto, 541-545. 1880.)

ERROR to U. S. Circuit Court, District of California.

STATEMENT OF FACTS.—The steamship *Ventura* was engaged in traffic between two ports in California, her route being on the Pacific Ocean. She was lost on one of her voyages, and this suit was brought by the owners of the cargo to recover its value from the owners of the vessel. The defense was based on section 4283 of the Revised Statutes, limiting the liability of owners of vessels for losses not occasioned by their fault or with their privity or knowledge, to their interest in the vessel and the freight then pending. There was judgment for defendant.

Opinion by WARRE, C. J.

The single question presented by the assignment of errors is, whether congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same state. It is conceded that while the *Ventura* carried goods from place to place in California, her voyages were always ocean voyages.

Congress has power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes" (Const., art. 1, sec. 8), but it has nothing to do with the purely internal commerce of the states, that is to say, with such commerce as is carried on between different parts of the same state,

if its operations are confined exclusively to the jurisdiction and territory of that state, and do not affect other nations or states or the Indian tribes. This has never been disputed since the case of *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *infra*). The contracts sued on in the present case were in effect to carry goods from San Francisco to San Diego by the way of the Pacific Ocean. They could not be performed except by going not only out of California, but out of the United States as well.

§ 1132. *Congress has power to regulate commerce between two ports of the same state, the route traversed being on the high seas.*

Commerce includes intercourse, navigation, and not traffic alone. This was settled in *Gibbons v. Ogden*, *supra*. "Commerce with foreign nations," says Mr. Justice Daniel, for the court, in *Veazie v. Moor*, 14 How., 568 (§ 1202, *infra*), "must signify commerce which, in some sense, is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extra-territorial." P. 573. The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore, the *Ventura* went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations, and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If, in her navigation, she inflicted a wrong on another country, the United States, and not the state of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such, she, and the business in which she was engaged, were subject to the regulating power of congress. Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of "external concern," affecting the nation as a nation in its external affairs. It must, therefore, be subject to the national government.

§ 1133. *Section 4283 of the Revised Statutes is applicable to commerce on the high seas, without reference to the termini of the voyage.*

This disposes of the case, since, by section 4289 of the Revised Statutes, the provisions of section 4283 are not applicable to vessels used in rivers or inland navigation, and this legislation, therefore, is relieved from the objection that proved fatal to the trade-mark law which was considered in *Trade-Mark Cases*, 100 U. S., 82. The commerce regulated is expressly confined to a kind over which congress has been given control. There is not here, as in *Allen v. Newberry*, 21 How., 244, a question of admiralty jurisdiction under the law of 1845, but of the power of congress over the commerce of the United States. The contracts sued on do not relate to the purely internal commerce of a state, but impliedly, at least, connect themselves with the commerce of the world, because in their performance the laws of nations on the high seas may be involved, and the United States compelled to respond.

Having found ample authority for the act as it now stands in the commerce clause of the constitution, it is unnecessary to consider whether it is within the judicial power of the United States over cases of admiralty and maritime jurisdiction.

*Judgment affirmed.*



## THE DANIEL BALL.

(10 Wallace, 557-566. 1870.)

APPEAL from U. S. Circuit Court, Western District of Michigan.

STATEMENT OF FACTS.—The Daniel Ball was a steamer navigating Grand river, Michigan, between Grand Rapids and Grand Haven, transporting merchandise and passengers, some goods being destined for points out of the state, and some received from other states, but had not complied with the acts of 1838 and 1852, providing for the inspection of vessels carrying passengers, and was libeled accordingly. The district court having dismissed the libel, the circuit court reversed this decision and decreed the penalty.

Opinion by MR. JUSTICE FIELD.

Two questions are presented in this case for our determination. First. Whether the steamer was at the time designated in the libel engaged in transporting merchandise and passengers on a navigable water of the United States within the meaning of the acts of congress; and, second, Whether those acts are applicable to a steamer engaged as a common carrier between places in the same state, when a portion of the merchandise transported by her is destined to places in other states, or comes from places without the state, she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another state.

§ 1134. *The doctrine of the common law as to the navigability of waters has no application in this country. The ebb and flow of the tide do not here constitute the test.*

Upon the first of these questions we entertain no doubt. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all, of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. The *Genesee Chief v. Fitzhugh*, 12 How., 457; The *Hine v. Trevor*, 4 Wall., 555. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity.

§ 1135. *Rivers that are navigable in fact are navigable in law; are navigable waters of the United States, when.*

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.

§ 1136. *Grand river, Michigan, from Grand Rapids, is a navigable water of the United States.*

If we apply this test to Grand river, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other states and with foreign countries, and is thus brought under the direct control of congress in the exercise of its commercial power.

§ 1137. *The commercial power of congress authorizes legislation for the protection or advancement of interstate or foreign commerce.*

That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. "The power to regulate commerce," this court said in *Gilman v. Philadelphia*, 3 Wall., 724 (§§ 1164-70, *infra*), "comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of congress." But it is contended that the steamer *Daniel Ball* was only engaged in the internal commerce of the state of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand river is a navigable water of the United States; and this brings us to the consideration of the second question presented.

§ 1138. *A state can control its own internal commerce.*

There is undoubtedly an internal commerce which is subject to the control of the states. The power delegated to congress is limited to commerce "among the several states," with foreign nations, and with the Indian tribes. This limitation necessarily excludes from federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a state, and does not extend to or affect other states. *Gibbons v. Ogden*, 9 Wheat., 194 (§§ 1183-1201, *infra*).

§ 1139. *Vessels are engaged in commerce between the states, when.*

In this case it is admitted that the steamer was engaged in shipping and transporting down Grand river, goods destined and marked for other states than Michigan, and in receiving and transporting up the river, goods brought within the state from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the state, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other states, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of congress. She was employed as an instrument of that commerce; for whenever

a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of congress.

It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market. We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter.

We perceive no error in the record, and the decree of the circuit court must be affirmed.

HALL v. DECUIR.

(5 Otto, 495-517. 1877.)

ERROR to the Supreme Court of Louisiana.

STATEMENT OF FACTS.—Benson, the owner and master of a steamer plying between New Orleans and Vicksburg, and enrolled and licensed for the coasting trade, was sued by a colored person under the act of the legislature of Louisiana of February 23, 1869, for refusing her on his boat the same accommodations he granted to white passengers.

§ 1140. *The construction of a statute by the highest court of a state is conclusive upon this court.*

Opinion by WAITE, C. J.

For the purposes of this case, we must treat the act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons traveling in that state, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts. It is with this provision of the statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the states.

§ 1141. *The powers of state legislatures over matters of commerce.*

There can be no doubt but that exclusive power has been conferred upon

congress in respect to the regulation of commerce among the several states. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, "legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution." *Sherlock v. Alling*, 93 U. S., 103; *State Tax on Railway Gross Receipts*, 15 Wall., 284 (§§ 1263-64, *infra*). Thus, in *Munn v. Illinois*, 94 U. S., 113 (§§ 1349-67, *infra*), it was decided that a state might regulate the charges of public warehouses, and in *Chicago, etc., R. Co. v. Iowa*, id., 155 (§§ 2138-42, *infra*), of railroads situate entirely with the state, even though those engaged in commerce among the states might sometimes use the warehouses or the railroads in the prosecution of their business. So, too, it has been held that states may authorize the construction of dams and bridges across navigable streams situate entirely within their respective jurisdictions. *Willson v. Blackbird Creek Marsh Co.*, 2 Pet., 245 (§§ 1174-76, *infra*); *Pound v. Turck*, 5 Otto, 459 (§§ 1171-73, *infra*); *Gilman v. Philadelphia*, 3 Wall., 713 (§§ 1164-70, *infra*). The same is true of turnpikes and ferries. By such statutes the states regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control, except when employed in foreign or interstate commerce. As they can only be used in the state, their regulation for all purposes may properly be assumed by the state, until congress acts in reference to their foreign or interstate relations. When congress does act, the state laws are superseded only to the extent that they affect commerce outside the state as it comes within the state. It has also been held that health and inspection laws may be passed by the states. *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *infra*); and that congress may permit the states to regulate pilots and pilotage until it shall itself legislate upon the subject. *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How., 299 (§§ 1541-47, *infra*). The line which separates the powers of the states from this exclusive power of congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved.

§ 1142. *A statute of a state, purporting to control vessels engaged in interstate commerce, as to the accommodations of their passengers, is a regulation of commerce between the states.*

But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those

taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

It was to meet just such a case that the commercial clause in the constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, "exemplary as well as actual," by any one who felt himself aggrieved because he had been excluded on account of his color.

This power of regulation may be exercised without legislation as well as with it. By refraining from action, congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the states, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it, within the meaning of the constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the court, in *Welton v. State of Missouri*, 91 U. S., 282 (§§ 1379-83, *infra*), "inaction [by congress] . . . is equivalent to a declaration that interstate commerce shall remain free and untrammelled." Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers

among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from congress and not from the states.

We confine our decision to the statute in its effect upon foreign and interstate commerce, expressing no opinion as to its validity in any other respect. Judgment will be reversed and the cause remanded, with instructions to reverse the judgment of the district court, and direct such further proceedings in conformity with this opinion as may appear to be necessary; and it is so ordered.

§ 1143. "*Commerce*" includes navigation.

Concurring opinion by MR. JUSTICE CLIFFORD.

Power to regulate commerce is, by the constitution, vested in congress; and it is well-settled law that the word "commerce," as used in the constitution, comprehends navigation, which extends to every species of commercial intercourse between the United States and foreign nations, and to all commerce in the several states, except such as is completely internal, and which does not extend to or affect the other states. *State Tonnage Tax Cases*, 12 Wall., 204 (§§ 1431-36, *infra*).

§ 1144. — and the power of congress extends to the regulation of transportation of passengers as well as of goods.

Beyond all doubt, the power as conferred includes navigation as well as traffic, and it is equally well settled that it extends to ships and vessels exclusively employed in conveying passengers as well as to those engaged in transporting goods and merchandise. *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *infra*). Equality of right and privilege is guaranteed by the thirteenth article of the state constitution to every person in the state transported in the vehicles or water-craft of a common carrier of passengers, in the words following, to wit: "All persons shall enjoy equal rights and privileges upon any conveyance of a public character." Rules and regulations to enforce that provision have been enacted by the state legislature, as fully set forth in the transcript. *Sess. Laws La.* (1869), 37.

§ 1145. *Right of common carrier to adopt regulations.*

Common carriers of the kind, it is conceded, may adopt rules and regulations for the management of their business, not inconsistent with the state constitution and the enactment of the state legislature. By the terms of that enactment they may refuse to admit persons to such conveyance when the vehicle or water-craft does not contain room or suitable accommodations for the purpose, and they may refuse to admit an applicant, or expel him or her after admission, if the applicant refuses to pay fare, or is of infamous character, or is guilty, in the conveyance, of gross, vulgar or disorderly conduct, or shall commit any act in violation of the known rules and regulations of such carrier, tending to injure his business, provided such rules and regulations make no discrimination on account of race or color. Such rules and regulations as are there authorized must be duly made known to the public in order to be operative, and they must not deny to the applicant any right or privilege on account of race, color or previous condition of servitude.

Sufficient appears to show that the plaintiff is a person of color, and that the defendant is the master and owner of the steamer, which is a packet vessel duly enrolled and licensed for the coasting trade, and that the vessel was engaged in carrying passengers and cargo between the port of New Orleans, in the state of Louisiana, and the port of Vicksburg, in the state of

Mississippi; that the steamer has two cabins for the accommodation of passengers, conveniently arranged one above the other; that the upper is assigned to white persons and that the lower is assigned to persons of color, both being constructed with state-rooms, cabin, and a hall used as a dining-room where meals are furnished; that the plaintiff, being at the time in New Orleans, and desiring to visit her plantation in another parish of the same state, went on board the steamer to secure her passage to the proper landing near her plantation; that the clerk of the steamer, to whom she applied for a passage in the upper cabin, having previously informed her agent that he could not give her a passage in that cabin, refused her request, telling her at the same time that he would give her a passage in the lower cabin; that the plaintiff declined to accept a berth in the lower cabin, and that she passed the night during which she remained on board sitting in a chair in what is known as the recess back of the upper cabin.

Both parties concede that the steamer was engaged in one of her regular trips from New Orleans to Vicksburg, and it appears that the plaintiff took passage for the landing called the Hermitage, and that on arriving there she paid \$5 fare, which is the regular fare to that landing for persons whose passage is in the lower cabin, and that it was \$2 less than the regular fare for persons whose passage is in the upper cabin. Proof of a decisive character is exhibited that the plaintiff applied for a berth in the upper cabin, which was refused, and that she declined to accept one in the lower cabin, which by the rules and regulations of the steamer is assigned for persons of color. Based upon these undisputed facts, the charge of the declaration is that the plaintiff was denied the equal rights and privileges guaranteed and secured to all persons by the state constitution and the aforesaid act of the state legislature. Superadded to that is also the charge that such equal rights and privileges were denied to her on account of her race and color, for which she claims actual and exemplary damages in the sum of \$75,000.

Service was made and the defendant appeared and set up, among others, the defenses following: 1. That the steamer, being enrolled and licensed according to the act of congress to pursue the coasting trade, is governed by the laws of the United States, and may make all reasonable rules and regulations for the prosecution of her business. 2. That the state constitution and law set up are in violation of the provision of the federal constitution which authorizes congress to regulate commerce among the several states. 3. That the steamer at the time alleged was engaged in prosecuting commerce between the port of New Orleans, in the state of Louisiana, and the port of Vicksburg, in the state of Mississippi, and consequently was not subject to the state regulations set up in the declaration.

Under the state practice these defenses were pleaded as an exception to the alleged cause of action. Hearing was had and the exception was overruled, the court giving leave to the defendant to plead the same in his answer. Pursuant to that leave, the defendant set up the same defenses in the answer, adding thereto the following: 1. That he, as owner, had by law the right to prescribe rules and regulations for the accommodation of passengers in his steamer. 2. That all such steamers engaged in commerce and navigation in those waters have a well-known regulation that persons of color are not placed in the same cabin with white persons. 3. That the regulation is reasonable, usual and customary, and was made for the protection of their business, and had been well known to the plaintiff for many years. Evidence was subse-

quently taken, the cause submitted to the court without a jury, the parties heard, and judgment entered for the plaintiff in the sum of \$1,000 with interest and cost; and the defendant appealed to the supreme court of the state, where the parties were again heard, and the judgment of the district court was affirmed.

Provision is made by the fourth section of the state statute in question, that the plaintiff, in such a case, may recover exemplary as well as actual damages for a violation of the equal rights and privileges guarantied to all persons in the state by the state constitution. Suppose this is so, still the defendant insists that errors were committed by the court in the trial of the case for which the judgment should be reversed; and the transcript shows that he sued out a writ of error, and removed the case into this court.

Three of the errors assigned are still the subject of complaint: 1. That the court erred in holding that the state constitution and statute in question are valid. 2. That the court erred in deciding that those two provisions are not regulations of commerce. 3. That the court erred in deciding that those provisions are not in conflict with the federal constitution.

Congress, it is conceded, possesses the exclusive power to regulate commerce; and it is everywhere admitted that both traffic and navigation are included in its ordinary signification, and that it embraces ships and vessels as the instruments of intercourse and trade as well as the officers and seamen employed in their navigation. *People v. Brooks*, 4 Den. (N. Y.), 469. Steamboats as well as sailing ships and vessels are required to be enrolled and licensed; and the record shows that the steamer in question had conformed in all respects to the regulations of congress in that regard, and that she was duly enrolled and licensed for the coasting trade, and that she was then and there engaged in the transportation of passengers and freight between the port of New Orleans and the port of Vicksburg.

§ 1146. *Steamers duly enrolled and licensed, plying between ports of different states, are vessels of the United States, entitled to be considered as engaged in the coasting trade.*

None, it is supposed, will deny the power of congress to enroll and license ships and vessels to sail from a port of one state to the ports of another; and it is equally clear that such ships and vessels are deemed ships and vessels of the United States, and that they are entitled as such to all the privileges of ships and vessels employed in the coasting trade. 1 Stat., 287, 305; 3 Kent Com. (12th ed.), 145. Ships and vessels enrolled and licensed as required by that act are fully authorized to carry on that trade, the act of congress, in direct terms, providing that such ships and vessels, and no others, shall be deemed ships and vessels of the United States, entitled to the privileges of ships and vessels employed in the coasting trade or fisheries. *Gibbons v. Ogden*, *supra*; 1 Stat., 288; *White's Bank v. Smith*, 7 Wall., 646. Language more explicit could not well be chosen to express the intention of congress, and, in my judgment, it fully warrants the conclusion reached by Marshall, C. J., in that case, that the section contains a positive enactment that the ships and vessels it describes shall be entitled to the privileges of ships and vessels employed in the coasting trade.

Undisputed proof is exhibited in the record that the steamer was duly enrolled and licensed, and that she was engaged in one of her regular trips between the port of New Orleans and the port of Vicksburg, transporting passengers and freight. Grant that, and it follows that she must be deemed



to have been a ship or vessel of the United States entitled to all the privileges of ships and vessels engaged in the coasting trade, pursuant to the act of congress providing for the enrollment and license of such ships and vessels and the regulation of such trade. Attempt was made in the leading case to maintain that the license gave no right to trade; that its sole purpose was to confer the American character on the ship or vessel; but the court promptly rejected the proposition, and held that, where the legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right; and the court remarked that it would be contrary to all reason and to the course of human affairs to say that a state is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself. Instead of that, it is the enrollment that proves the national character of the ship or vessel; and the court decided in that case that the license could only be granted to vessels of twenty or more tons burden which had already been enrolled, and that the license to do a particular thing is a permission or authority to do that thing, and, if granted by a person having authority to grant it, transfers to the grantee whatever it purports to authorize. Packets which ply along the coast, say the court, as well as those making foreign voyages, consider the transportation of passengers as an important part of their business; and the court adjudged directly that a coasting vessel employed in that business is as much a portion of the national marine as one employed in the transportation of cargo, and that no reason exists for holding that such a vessel is withdrawn from the regulating power of the national government.

Without more, these references to the opinion in that great case are sufficient to show that the court there decided that the enrollment act is of itself a sufficient regulation of the navigation of all the public navigable rivers of the United States to secure to ships and vessels of the United States sailing under a coasting license the free navigation of all such public highways. Confirmation of that proposition, even more decisive than the opinion of the court, is found in the decree rendered in the case, where the court adjudge that the licenses set up by the appellant gave full authority to those vessels to navigate the waters of the United States for the purpose of carrying on the coasting trade, any law of the state to the contrary notwithstanding, and that so much of the law of the state as prohibited vessels so licensed from navigating the waters of the state by means of fire or steam is repugnant to the constitution of the United States, and void. Cases have arisen in which it is held that the states may rightfully adopt certain regulations touching the subject, which are local in their operation, where none have been ordained by congress; but it will not be necessary to enter that field of inquiry, or to attempt to reconcile those decisions with the conclusion in this case, as it is clear from the remarks already made that congress has prescribed the conditions which entitle ships and vessels belonging to the national marine to pursue the coasting trade without being subjected to burdensome and inconsistent state regulations. *Welton v. State of Missouri*, 91 U. S., 275 (§§ 1379-83, *infra*).

§ 1147. *The power to regulate commerce implies a power to control all the instruments by which it is conducted.*

Repeated decisions of this court have determined that the power to regulate commerce embraces all the instruments by which such commerce may be conducted; and it is settled law that where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of

regulation, the power is exclusive of all state authority. Whatever subjects of this power, says Mr. Justice Curtis, are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress. *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How., 299. Difficulty may attend the effort to prescribe any definition which will guide to a correct result in every case; but it is clear that a regulation which imposes burdensome or impossible conditions on those engaged in commerce, whether with foreign nations or among the several states, must of necessity be national in its character. *Henderson v. Mayor of New York*, 92 U. S., 259 (§§ 1336-42, *infra*). Apply that rule to the case, and it is clear, even if there be a class of state regulations which may be valid until the same ground is occupied by an act of congress or by a treaty, that the state regulation in question is not one of that class. Such a subject is in its nature national, and admits of only one uniform system or plan of regulation. Unless the system or plan of regulation is uniform, it is impossible of fulfilment. Mississippi may require the steamer carrying passengers to provide two cabins and tables for passengers, and may make it a penal offense for white and colored persons to be mixed in the same cabin or at the same table. If Louisiana may pass a law forbidding such steamer from having two cabins and two tables,—one for white and the other for colored persons,—it must be admitted that Mississippi may pass a law requiring all passenger steamers entering her ports to have separate cabins and tables, and make it penal for white and colored persons to be accommodated in the same cabin or to be furnished with meals at the same table. Should state legislation in that regard conflict, then the steamer must cease to navigate between ports of the states having such conflicting legislation, or must be exposed to penalties at every trip.

Those who framed the constitution never intended that navigation, whether foreign or among the states, should be exposed to such conflicting legislation; and it was to save those who follow that pursuit from such exposure and embarrassment that the power to regulate such commerce was vested exclusively in congress. Few or none will deny that the power to regulate commerce among the several states is vested exclusively in congress; and it is equally well settled that congress has, in many instances and to a wide extent, legislated upon the subject. *Sherlock v. Alling*, 93 U. S., 99; R. S., sec. 4311. Support to that proposition, of the most persuasive and convincing character, is found in the act of congress entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes," the forty-first section of which provides that all steamers navigating the lakes, bays, inlets, sounds, rivers, harbors or other navigable waters of the United States, when such waters are common highways of commerce or open to general or competitive navigation, shall be subject to the provisions of that act. 16 Stat., 453; R. S., sec. 4400. Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be on that account withdrawn from the control or protection of congress. *Gibbons v. Ogden*, *supra*.

§ 1148. *Congressional legislation upon the subject of commerce supersedes all state regulations.*

Differences of opinion may exist as to the extent and operation of the national law regulating commerce among the several states, but none, it is presumed, will venture to deny that it is regulated very largely by congressional

legislation. Admit that, and it follows that the legislation of congress, if constitutional, must supersede all state legislation upon the same, and, by necessary implication, prohibit it, except in cases where the legislation of congress manifests an intention to leave some particular matter to be regulated by the several states. *Cooley v. Board of Wardens, supra*. Decisive authority for that proposition is found in the unquestioned decisions of this court. Such were the views of Judge Story more than thirty-five years ago, when he said, if congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of congress, to prescribe additional regulations and what they may deem auxiliary provisions for the same purpose. *The Chusan*, 2 Story, 466; *Sinnot v. Com'rs of Pilotage of Mobile*, 22 How., 227. In such a case, the legislation of congress in what it does prescribe manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 539; *Gibbons v. Ogden, supra*; *White's Bank v. Smith, supra*. Whenever the terms in which a power is granted to congress, or the nature of the power, requires that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to exercise the power. *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1937-39, *infra*); *Brown v. State of Maryland*, 12 id., 419 (§§ 1466-70, *infra*).

Irrespective of the decisions of the state court, it might well be doubted whether the state statute in question does prohibit a steamer carrying passengers from having and maintaining separate cabins and eating-saloons for white and colored passengers, and whether the denial to a colored female of a passage in the cabin assigned to white female passengers is a denial of equal rights and privileges, within the meaning of the state constitution or the first section of the state statute in question, provided the applicant was offered a passage in the lower cabin, with equally convenient accommodation. Much discussion of that topic, however, is unnecessary, as two decisions of the state court conclusively determine the point that the state statute does contain such a prohibition, and that the facts of the case do bring the conduct of the defendant within that prohibition. *DeCuir v. Benson*, 27 La. Ann., 1; *Hart v. Hoss*, 22 id., 517; *Sauvinet v. Walker*, 27 id., 14.

§ 1149. *Where a state court so construes a state statute that it conflicts with the constitution of the United States a federal question arises.*

Even suppose the meaning of the statute is doubtful, still the rule of construction adopted by the highest court of a state, in construing their own constitution and one of their own statutes, in a case not involving any question re-examinable in this court under the twenty-fifth section of the judiciary act, must be regarded as conclusive in this court. *Provident Institution v. Massachusetts*, 6 Wall., 611; *Randall v. Brigham*, 7 id., 523; *Gut v. The State*, 9 id., 35 (§§ 579-581, *supra*). Where a state court gives such a construction to a state statute as to make it conflict with the constitution or laws of the United States, and sustains its validity after giving it such construction, and thereby deprives a party of his rights under the said constitution or law, it is settled law that a federal question does arise in such a case, and that this court can

review the decision of the state court as to the validity of such a statute. *Insurance Co. v. Treasurer*, 11 id., 204. Were it not so, it is clear that the constitutional provision could always be evaded by the state court's giving such a construction to the contract or the statute as to render the appellate power of this court of no avail in such cases to uphold the contract against unfriendly state legislation. *Delmas v. Insurance Co.*, 14 id., 661.

§ 1150. *The interpretation given to state statutes by state courts is the rule of decision in the federal courts.*

State courts certainly have a right to expound the statutes of the state; and, having done so, those statutes, with the interpretation given to them by the highest court of the state, become the rule of decision in the federal courts. *Richmond v. Smith*, 15 id., 429; *Jones v. City of Richmond*, 18 Gratt. (Va.), 517; *Leffingwell v. Warren*, 2 Black, 599. Argument to show that the question whether or not the state court erred in the construction of their own constitution and statute is not re-examinable in this court under the twenty-fifth section of the judiciary act is unnecessary, as the negative of the proposition is self-evident.

Governed by the laws of congress, it is clear that a steamer carrying passengers may have separate cabins and dining saloons for white persons and persons of color, for the plain reason that the laws of congress contain nothing to prohibit such an arrangement. Steamers carrying passengers for hire are bound, if they have suitable accommodation, to take all who apply unless there is objection to the character or conduct of the applicant. Applicants to whom there is no such valid objection have a right to a passage, but it is not an unlimited right. On the contrary, it is subject to such reasonable regulations as the proprietors may prescribe for the due accommodation of passengers and the due arrangement of the business of the carrier. Such proprietors have not only that right, but the farther right to consult and provide for their own interests in the management of the vessel as a common incident to their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the vessel, or who are guilty of gross and vulgar habits of conduct, or who make disturbances on board, or whose characters are doubtful, dissolute, suspicious or unequivocally bad. Nor are they bound to admit passengers on board whose object it is to interfere with the interests of the patronage of the proprietors, so as to make their business less lucrative or their management less acceptable to the public. *Jencks v. Coleman*, 2 Sumn., 221.

Corresponding views are expressed by the supreme court of Michigan in an analogous case, in which the distinction between the right of an applicant to be admitted on board, and his claim to dictate what part of the vessel he shall occupy, is clearly pointed out. Referring to that subject, the court say the right to be carried is one thing, and the privilege of a passenger on board as to what part of the vessel may be occupied by him is another and a very different thing; and they add, that it is the latter and not the former which is subject to reasonable rules and regulations, and is, where such rules and regulations exist, to be determined by the proprietors. Damages were claimed in that case for refusing the plaintiff the privilege of the cabin; but the court held that the refusal was nothing more or less than denying him certain accommodations from which he was excluded by the rules and regulations of the steamer. *Day v. Owen*, 5 Mich., 520.

§ 1151. *The powers of a common carrier of passengers over their accommodations are analogous to those of an inn-keeper at common law over those of his guests.*

Proprietors of the kind may make rules and regulations, but they must be reasonable; and the court held in that case that to be so they should have for their object the accommodation of the passengers, including everything to render the transportation most comfortable and least annoying, not to one or two or any given number carried at any particular time, but to the great majority ordinarily transported; and they also held that such rules and regulations should be of a permanent nature, and not be made for a particular occasion or emergency. Special and important duties indubitably are imposed upon carriers of passengers for the benefit of the traveling public; but it must not be forgotten that the vehicles and vessels which such carriers use do not belong to the public. They are private property, the use and enjoyment of which belong to the proprietors. Angell, Carriers (5th ed.), sec. 525. Concede what is undoubtedly true, that the use and employment of such vehicles and vessels, during the time they are allowed the privileges of common carriers, may be subjected to such conditions and obligations as the nature of their employment requires for the comfort, security and safety of passengers, still the settled rules of constitutional law forbid that a state legislature may invade the dominion of private right by arbitrary restrictions, requirements or limitations, by which the property of the owners or possessors would be virtually stripped of all utility or value if bound to comply with the regulations. *Jencks v. Coleman, supra.*

§ 1152. — *and one of those powers is to make reasonable and suitable regulations as regards passengers using their vehicles.*

Both steamboats and railways are modern modes of conveyance; but Shaw, C. J., decided that the rules of the common law were applicable to them, as they take the place of other modes of carrying passengers, and he held that they have authority to make reasonable and suitable regulations as regards passengers intending to pass and repass in their vehicles or vessels. *Commonwealth v. Power*, 7 Metc. (Mass.), 601; *Hibbard v. New York & Erie R. Co.*, 15 N. Y., 455; *Illinois Central R. Co. v. Whittemore*, 43 Ill., 420. They are, said the chief justice in that case, in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered to make such proper arrangements as will promote his own interests, but he is bound to regulate his house so as to preserve order, and, if practicable, prevent breaches of the peace. *Vinton v. Middlesex R. Co.*, 11 Allen (Mass.), 304. Cases of like import are quite numerous, and the supreme court of Pennsylvania decided directly that a public carrier may separate passengers in his conveyance; and they deduce his power to do so from his right of private property in the means of conveyance, and the necessity which arises for such a regulation to promote the public interest. Speaking to that point, they say that the private means the carrier uses belong wholly to himself; and they held the right of control in that regard as necessary to enable the carrier to protect his own interests, and to perform his duty to the traveling public. His authority in that regard, as that court holds, arises from his ownership of the property, and his public duty to promote the comfort and enjoyment of those traveling in his conveyance. Guided by those views, the court held that it is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or

well-known customary repugnancies which are likely to breed disturbances, where white and colored persons are huddled together without their consent. *West Chester & Philadelphia R. Co. v. Miles*, 55 Penn. St., 209.

§ 1153. *A passenger is entitled to room, but not to any particular room or special accommodation.*

Where the passenger embarks without making any special contract, and without knowledge as to what accommodations will be afforded, the law implies a contract which obliges the carrier to furnish suitable accommodations according to the room at his disposal; but the passenger in such a case is not entitled to any particular apartments or special accommodations. Substantial equality of right is the law of the state and of the United States; but equality does not mean identity, as in the nature of things identity in the accommodation afforded to passengers, whether colored or white, is impossible, unless our commercial marine shall undergo an entire change. Adult male passengers are never allowed a passage in the ladies' cabin, nor can all be accommodated, if the company is large, in the state-rooms. Passengers are entitled to proper diet and lodging; but the laws of the United States do not require the master of a steamer to put persons in the same apartment who would be repulsive or disagreeable to each other. Steamers carrying passengers as a material part of their employment are common carriers, and as such enjoy the rights and are subject to the duties and obligations of such carriers; but there was and is not any law of congress which forbids such a carrier from providing separate apartments for his passengers. What the passenger has a right to require is such accommodation as he has contracted for, or, in the absence of any special contract, such suitable accommodations as the room and means at the disposal of the carrier enable him to supply; and in locating his passengers in apartments and at their meals it is not only the right of the master, but his duty, to exercise such reasonable discretion and control as will promote, as far as practicable, the comfort and convenience of his whole company.

§ 1154. *The separation of white and colored children in public schools considered analogous in principle.*

Questions of a kindred character have arisen in several of the states, which support these views in a course of reasoning entirely satisfactory and conclusive. Boards of education were created by a law of the state of Ohio, and they were authorized to establish within their respective jurisdictions one or more separate schools for colored children when the whole number by enumeration exceeds twenty, and when such schools will afford them, as far as practicable, the advantages and privileges of a common-school education. Under that law, colored children were not admitted as a matter of right into the schools for white children, which gave rise to contest, in which the attempt was made to set aside the law as unconstitutional; but the supreme court of the state held that it worked no substantial inequality of school privileges between the children of the two classes in the locality of the parties; that equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school; and that any classification which preserves substantially equal school advantages is not prohibited by either the state or federal constitution, nor would it contravene the provisions of either. *State v. McCann*, 21 Ohio St., 198.

Separate primary schools for colored and for white children were maintained

in the city of Boston. Children in the state who are unlawfully excluded from public school instruction may recover damages; therefor against the city or town by which such public instruction is supported. It appears that the plaintiff was denied admission to the primary school for white children, and she by her next friend claimed damages for the exclusion; but the supreme court, Shaw, C. J., giving the opinion, held that the law vested the power in the committee to regulate the system of distribution and classification, and that when the power was reasonably exercised their decision must be deemed conclusive. Distinguished counsel insisted that the separation tended to deepen and perpetuate the odious distinction of caste; but the court responded that they were not able to say that the decision was not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment. *Roberts v. City of Boston*, 5 Cush. (Mass.), 198.

§ 1155. — *so as to the separation of school children on account of age or sex.*

Age and sex have always been marks of classification in public schools throughout the history of our country, and the supreme court of Nevada well held that the trustees of the public schools in that state might send colored children to one school and white children to another, or they might make any such classification as they should deem best, whether based on age, sex, race or any other reasonable existent condition. *State v. Duffy*, 7 Nev., 342. Directors of schools in Iowa have no discretion under the existing law of the state to deny a youth of proper age admission to any particular school on account of nationality, color or religion. Former statutes of the state invested the directors with such discretion, and it is impliedly conceded that it would be competent for the legislature again to confer that authority. *Clark v. Board of Directors*, 24 Ia., 266. School privileges are usually conferred by statute, and, as such, are subject to such regulations as the legislature may prescribe. Such statutes generally provide for equal school advantages for all children, classifying the scholars as the legislature in its wisdom may direct or authorize; and the supreme court of New York decided that the legislature of the state may from time to time make such limitations and alterations in that regard as they may see fit. *Dallas v. Fosdick*, 40 How. (N. Y.) Pr., 249. Public instruction of the kind is regulated in that state by official boards created for the purpose; and it is settled law there that the board may assign a particular school for colored children, and exclude them from schools assigned for white children, and that such a regulation is not in violation of the fourteenth amendment. *People v. Gaston*, 13 Abb. (N. Y.) Pr. (N. S.), 160.

§ 1156. *The mere fact that a vessel stops at intermediate ports does not deprive the remainder of the trip of its interstate character.*

Ships and vessels duly enrolled and licensed for the coasting trade may lawfully touch at intermediate ports, to receive or discharge passengers or cargo; but the fact that they do so does not in the least change or alter the character of the trip, or diminish the right of the vessel to enjoy all the privileges of a vessel engaged in commerce between ports in different states; nor does the fact that the plaintiff expected to leave the steamer at a landing in the same state enlarge her right of accommodation, or augment in any respect the obligations of the steamer as a public carrier, for the reason that the steamer sailed throughout the whole trip under her coasting license, and her rights and privileges, duties and obligations, must be ascertained and defined by the regulations prescribed by the acts of congress. Commercial regulations of the

kind cannot be effectual to accomplish the object for which they were required and designed to effect, unless it be held that they extend to the entire voyage, as well that portion of it which is in the state where the voyage began as that which extends into another state, as the whole is performed under the coasting license founded in the acts of congress passed to regulate such commerce and navigation. Throughout our history the acts of congress have regulated the enrollment and license of vessels to be engaged in the coasting trade, and this court expressly determined that a state law which imposed another and an additional condition to the privilege of carrying on that trade within her waters is inoperative and void. *Sinnot v. Com'rs of Pilotage of Mobile*, 22 How., 227; *Foster v. Com'rs of Pilotage of Mobile*, 22 id., 244; *State of Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How., 421 (§§ 1203-12, *infra*).

§ 1157. *Sinnot v. Commissioners of Pilotage considered and approved.*

Alabama passed an act to the effect that vessels engaged in foreign commerce, or in the coasting trade, shall not navigate her waters without complying with a condition not prescribed by the act of congress. By the state law, they are required, before leaving the described port, to file in the office of the judge of probate a statement in writing, setting forth as follows: 1. The name of the vessel. 2. The name of the owner or owners. 3. His or their place or places of residence. 4. The interest each has in the vessel. Speaking of that condition, the court say, if the interpretation of the court as to the force and effect of the privileges afforded to the vessel by the enrollment and license act in the leading case are to be maintained, it can require no argument to show a direct conflict between this act and the act of congress regulating the coasting trade. *Sinnot v. Com'rs of Pilotage of Mobile*, *supra*. Nor does it require any argument to show that the state law before the court is exactly analogous in principle to the state law declared void in that case. Like the former, the latter imposes an additional condition to the privilege of carrying on the coasting trade within the waters of the state, not prescribed by any act of congress. Enrolled and licensed vessels have the constitutional right to pursue the coasting trade on the terms and conditions which congress has seen fit to prescribe, and no state legislature can interfere with that right, either to abridge or enlarge it, or to subject it to any terms and conditions whatsoever. Commerce among the several states, as well as commerce with foreign nations, requires uniformity of regulation; and that power is by the constitution vested exclusively in congress, as appears by the constitution itself, and by an unbroken course of the decisions of this court, covering a period of more than half a century.

§ 1158. *Coger v. Packet Co.*, 37 Ia., 145, distinguished.

Judicial authority to support the theory of the court below is entirely wanting, except what may be derived from the case of *Coger v. Packet Co.*, 37 Ia., 145, decided by the supreme court of the state. Special damage was claimed by the plaintiff in that case, of the master of a steamer navigating the Mississippi river, for removing her, she being a colored woman, from the dining-room of the steamer without just cause. Regulations had previously been adopted by the steamer excluding colored persons from the state-rooms and other first-class privileges and accommodations. Service was made, and the defendant appeared and pleaded those regulations as a defense. Hearing was had, and the court decided that persons of color were entitled to the same rights and privileges, when traveling, as white persons, and that they cannot be required, by any rule or custom based on distinction of color or race, to accept other or different accommodations than those furnished to white persons. Abundant



reasons exist to show that the decision in that case is not an authority in the case before the court, a few of which will be stated: 1. Because the report of the case does not show that the steamer was navigating under a coasting license. 2. Because the constitutional question involved in the case before the court was neither involved, presented nor considered in that case, either by the bar or the court. 3. Because the decision was rested entirely upon other and different grounds. 4. Because the facts of the two cases are widely and substantially different.

§ 1159. *References to the Civil Rights Act and the Dred Scott Case.*

Colored persons, it is admitted, are citizens, and that citizens, without distinction of race or color or previous condition of servitude, have the same right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of personal property, as is enjoyed by white citizens. 14 Stat., 27. States are also forbidden to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Enforcement Act, 16 id., 140; Fourteenth Amendment to the Constitution. Vague reference is made to the Civil Rights Act and to the preceding amendment to the constitution, as if that act or the said amendment may supersede the operation and legal effect of the coasting license as applied to the case before the court; but it is clear that neither of those provisions, nor both combined, were intended to accomplish any such purpose. Enough appears in the language employed in those provisions to show that their principal object was to confer citizenship, and the rights which belong to citizens as such, upon the colored people, and in that manner to abrogate the rule previously adopted by this court in the Dred Scott Case. By the Civil Rights Act, the rule adopted in that case is entirely superseded, and all the substantial rights of citizens are conferred upon the colored people, as more fully appears by the enumeration contained in the first section of the act. Under no view, therefore, that can properly be taken of that act can it be held to supersede, repeal, modify or affect the act of congress, providing for the enrollment and licensing of ships and vessels for the coasting trade. *Dallas v. Fosdick, supra.*

Certain phases of the question were also presented to the district court of Philadelphia, in the case of *Goines v. M'Candless*, 4 Phil. C. P., 255, in which the court admitted that a corporation created for the carriage of passengers cannot arbitrarily refuse to carry any man or class of men without laying itself open to an action for damages: but the court held in the same case that such a corporation may establish reasonable rules for the comfort and convenience of those whom it is bound to carry, even though the effect may be to exclude particular individuals falling within those rules.

§ 1160. *Congress has regulated interstate commerce by the licensing and enrolling of vessels in the coasting trade.*

Evidence of a decisive character that congress has regulated interstate commerce is also found in the act supplemental to the act providing for the enrollment and licensing of ships and vessels for the coasting trade, the first section of which divides the sea coasts and navigable rivers into three great districts, and provides as follows: 1. That the first shall include all the collection districts on the sea coast and navigable rivers between the limits of the United

States and the southern limits of Georgia. 2. That the second shall include all the collection districts and navigable rivers between the river Perdido and the Rio Grande. 3. That the third shall include all the collection districts on the sea coast and navigable rivers between the southern limits of Georgia and the river Perdido. R. S., sec. 4348; 3 Stat., 493. Congress having legislated upon the subject, it cannot be that the state legislatures have a right to interfere and prescribe additional regulations, as the legislation of congress clearly indicates that the national law-makers never intended to leave anything open upon the subject to the discretion of the state legislatures.

Two opposing theories, sometimes advanced in such controversies, deserve some brief comments before concluding the examination of the case. They are in substance and effect as follows: 1. That the effect of the coasting license issued under the enrollment act is merely to evidence the national character of the vessel; that the acts of congress requiring the register and enrollment of vessels was never intended as the exercise of the power of congress to regulate commerce among the states, and that the states still possess the concurrent power to prescribe such regulations until congress shall ordain express provisions to control and restrict the regulations enacted by the states. 2. That the supreme court, by a decision made subsequent to the decree in the great leading case in which it is held that the power to regulate commerce is vested exclusively in congress, qualified, if they did not positively overrule, that generally acknowledged rule upon the subject.

1. Enough, it would seem, has already been remarked to refute the first opposing theory; but, if more be needed, it will be found in the fact that it is the exact theory maintained by the courts of the state where the controversy arose, and whose final decree was removed into this court for re-examination. None will attempt to deny that proposition who ever read the opinions delivered in the subordinate courts. *Ogden v. Gibbons*, 4 Johns. (N. Y.) Ch., 150; S. C., 17 Johns., 488; 1 Kent Com. (12th ed.), 435. Explanations respecting that historical controversy, of a more satisfactory character, are given by Chancellor Kent than by any other legal writer who has undertaken to state the constitutional questions which it involved, and which were finally determined by the unanimous judgment of this court. His statement of the case is as follows: That the respondent set up, by way of right and title to navigate the waters of the state in opposition to the grant of the complainant, that his steamboats were duly enrolled and licensed under the enrollment act, to be employed in carrying on the coasting trade; that the question in the case was whether such a coasting license conferred the power to interfere with the grant of the state under which the complainant claimed the exclusive right to navigate the waters of the state which made the grant.

Eminent counsel represented both sides of the question, and we are informed by the learned commentator that the courts of the state in the two cases referred to decided against the defense set up in the answer of the respondent, and held that the coasting license merely gave to the steamboats of the respondent the character of American vessels; that the license was not intended to decide a question of property, or to confer a right of property or a right of navigation or commerce; that the courts of that state during that period never regarded the act regulating the coasting trade as intended to assert any supremacy over state regulations in respect to internal waters or commerce, for the reason that those courts did not consider that act as the exercise of the power vested in congress to regulate commerce among the states. Competent

evidence to show that the courts of that state in those two cases took the exact same ground as that involved in the theory in question is very abundant and conclusive, without looking elsewhere than to the lecture of the chancellor under consideration. Decisive support to that conclusion is also found in what follows in the same connection in the same lecture, in which he says that the courts of the state did not, either in the case of *Ogden v. Gibbons* or in any of the cases which preceded it, deny to congress the power to regulate commerce among the states by express and direct provision, so as to control and restrict the exercise of the state grant; that they only insisted that without some such explicit provision the state jurisdiction over the subject was in full force, which is exactly what is claimed by those who seek to undermine the doctrines of the great leading case.

Beyond all question, the views of the chancellor as to what was decided by the courts of the state in that great controversy are correct, and it will be equally instructing to ascertain what his views are as to what followed in this court. Speaking upon that subject, he says the cause was afterwards carried up by appeal to the supreme court of the United States, where the decree was reversed on the ground that the grant to the complainant was repugnant to the rights and privileges conferred upon the steamboats of the respondent navigating under a coasting license; that in the construction of the power to regulate commerce the supreme court held that the term meant not only traffic but intercourse, and that it included navigation, and that the power to regulate commerce was a power to regulate navigation; that commerce among the several states meant commerce intermingled with the states, and which might pass the external boundary line of each state, and be introduced into the interior; that the power conferred comprehended navigation within the limits of every state, and that it may pass the jurisdictional line of a state and be exercised within its territory, so far as the navigation is connected with foreign commerce or with commerce among the several states; and that the power, like all the other powers of congress, is plenary and absolute within its acknowledged limits.

§ 1161. *Limitations upon the power of congress to regulate commerce.*

Three limitations or restrictions, as the chancellor states, were admitted by the supreme court in that case to exist to the limits of that power as conferred: 1. That the power does not extend to that commerce which is completely internal, and is carried on between different parts of the same state, not extending to or affecting other states. 2. That the power is restricted to that commerce which concerns more states than one, the completely internal commerce of a state being reserved for the state itself. 3. That the power conferred does not prohibit the states from passing inspection laws or quarantine or health laws, and laws for regulating highways and ferries, nor does it include the power to regulate the purely internal commerce of a state, or to act directly on its system of police. 1 Kent Com. (12th ed.), 437. Many efforts have been made to analyze and expound the opinion delivered by the great magistrate in that case, but none, it is believed, were ever attended with such complete success as that of the commentator to which reference is made. He was the chancellor of the state court, and gave the original opinion; and, when he found that his decree was reversed by the supreme court, he was influenced by the highest motive to ascertain the true grounds assumed in the judgment of the appellate court.

Judge Story says, in his *Commentaries on the Constitution*, that it has been settled, upon the most solemn deliberation, that the power to regulate com-

merce is exclusive in the government of the United States; and he adds in another section of the Commentaries, that the reasoning by which the power given to congress to regulate commerce is maintained to be exclusive has not of late been seriously controverted, and that it seems to have the cheerful acquiescence of the learned tribunals of a particular state, one of whose acts brought it first under judicial examination. 2 Story, Const. (3d ed.), secs. 1067, 1071; *Steamboat Co. v. Livingston*, 3 Cow. (N. Y.), 13; *The People v. Brooks*, 4 Denio (N. Y.), 469; *Pomeroy*, Const. (3d ed.), sec. 371; *Sergeant*, Const. (2d ed.), 308; *Rawle*, Const. (2d ed.), §2; *Railroad Company v. Husen*, 5 Otto, 465 (§§ 1062-65, *supra*). Repeated decisions of this court, including the one at the present term, have established that rule as the settled law of the court; nor is there any case in the reported decisions of the court, when properly understood, which gives any countenance or support to the theory under examination, unless it be the case of *Gilman v. Philadelphia*, 3 Wall., 713 (§§ 1164-70, *infra*), which it is not admitted, when taken as a whole, falls within that category. Certain admissions are contained in the opinion in that case which are certainly in conflict with the theory which it is the purpose of these observations to refute. Mr. Justice Swayne very properly admits that the enrollment act authorizes vessels enrolled and licensed according to its provisions to engage in the coasting trade; that commerce includes navigation; and that the power to regulate commerce comprehends the control, for that purpose and to the extent necessary, of the navigable waters of the United States which are accessible from a state other than those in which they lie. For that purpose, says the same learned judge, they are the public property of the nation, and subject to all the requisite legislation by congress. *Gibbons v. Ogden*, *supra*; *Corfield v. Coryell*, 4 Wash., 371.

These are the authorities cited to support the proposition; and the learned justice adds, that this necessarily includes the power to keep such waters open and free from any obstruction to their navigation interposed by the states or otherwise, to remove such obstructions when they exist, and to provide by such sanctions as they, the congress, may deem proper against the occurrence of the evil and for the punishment of offenders. For these purposes, congress, says the judge, possesses all the powers which existed in the states before the adoption of the national constitution, and which have always been vested in the parliament of England; and he further added, that commerce among the states does not stop at a state line; that, coming from abroad, it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable. Wherever commerce among the states goes, the power of the nation goes with it, to protect and enforce its rights. Nothing more surely can be needed to show that the theory under discussion is erroneous and fallacious.

§ 1162. *The supreme court has never overruled or qualified the doctrine held in Gibbons v. Ogden, as to the powers of congress over interstate commerce.*

2. Whatever support exists to the second theory mentioned is found in a single case, which has sometimes been strangely misunderstood at the bar. *Willson v. Blackbird Creek Marsh Co.*, 2 Pet., 245 (§§ 1174-76, *infra*). Proper attention to the facts of the case will show that the creek in question was one of those many creeks passing through a deep level marsh adjoining the river Delaware, up which the tide flows for some distance; that the property on the bank of the creek was of little or no value unless it was reclaimed by excluding the water from the marsh; and that the health of the residents of the

neighborhood required that such improvement should be made. Measures calculated to effect those objects had been adopted; and the court held that the state legislature might lawfully authorize the necessary erections to accomplish those important objects.

Judgment was rendered by the same court which gave the judgment in the case of *Gibbons v. Ogden*; and no one has ever been able to assign any reason to conclude that the constitutional views of the court had at that time undergone any change. Instead of overruling that great case, it will be seen that the chief justice who gave the opinion did not even allude to it; though, as a sound exposition of the federal constitution, it is not second in point of importance to any one that great magistrate ever delivered. Evidently he had no occasion to refer to it or to any of its doctrines, as he properly described the creek over which the dam was erected as a low, sluggish water, of little or no importance, and treated the erection of the dam as one adapted to reclaim the adjacent marshes, and as essential to the preservation of the public health, and sustained the constitutionality of the law authorizing the erection, upon the ground that it was within the reserved police powers of the state.

Congressional regulations, as embodied in the enrollment act and other acts of congress, apply to all public navigable waters of the United States; but every navigator employed in the coasting trade knows that there are many small creeks, channels and indentations along our Atlantic coast, especially in the marshes, which are never classed in the category of public navigable waters, though they are capable of being navigated by small vessels when the tide is full. Hundreds of such creeks, said Mr. Justice McLean, are similarly situated. In such cases, involving doubt whether the jurisdiction may not be exclusively exercised by the state, it is politic and proper in the judicial tribunals of the nation to follow the action of congress.

§ 1163. *Congress can exercise no power over the navigable waters of a state, except as regards the intercourse with other states and countries.*

Over the navigable waters of a state congress can exercise no commercial power, except as regards the intercourse with other states or foreign countries; and he adds that doubtless there are many creeks made navigable by the flowing of the tide or by the back water from large rivers, which the general phraseology of an act to regulate commerce may not embrace; that in all such cases, and many others that may be found to exist, this court could not safely exercise a jurisdiction not expressly sanctioned by congress. When the language of the court in that case is applied to the facts of the case, said Justice McLean, no such principle as that assumed in argument is sanctioned; that the construction of the dam was not complained of as a regulation of commerce, but as an obstruction to commerce; that the court held that, inasmuch as congress had not assumed to control state legislation over those small navigable creeks into which the tide flows, the judicial power could not do so; that the act of the state was an internal and a police power to guard the health of its citizens, and that nothing more was found in the case than a forbearance to exercise power over a doubtful object, which should ever characterize the judicial branch of the government. *Passenger Cases*, 7 How., 283 (§§ 1284-1335, *infra*).

Mr. Hamilton, in the thirty-first number of the *Federalist*, says that there is an exclusive delegation or alienation of state sovereignty in three cases: first, where the exclusive power is in terms given to congress; second, where an authority is granted to the Union, and the states are prohibited from exercising

a like authority; third, where an authority is granted to the Union, to which a similar authority in the states would be absolutely and wholly contradictory and repugnant. Even suppose that the power to regulate commerce falls within the third designation, still it is believed that sufficient has already been remarked to show that the nature of the power is such that it shows that the power should be exclusively exercised by congress. *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How., 299 (§§ 1541-47, *infra*); *State of Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How., 518; S. C., 18 id., 421 (§§ 1203-12, *infra*).

Both of the decisions in the *Wheeling bridge case* are subsequent in point of time to the case of *Willson v. Blackbird Creek Marsh Co.*, and so are the Commentaries of Judge Story upon the Constitution; and yet not an intimation is found in either that the doctrines of the great case referred to were ever modified or questioned. That such an intimation is not to be found anywhere is clearly demonstrated by a recent commentator, who has carefully reviewed every opinion given by this court upon that subject. *Pomeroy, Const.* (3d ed.), pp. 207-248. Waters lying wholly within a single state may be such as to be regarded as public navigable waters of the United States, because they are properly denominated as arms of the sea. Examples of the kind are numerous, of which it will be sufficient to mention the Hudson, from Albany to the sound; the Penobscot, from Bangor to the bay; the Kennebec, from the capital of the state to its mouth; and the Saco, from below the falls to the ocean; and many others, equally well known even to the pupils in the common schools. All such public navigable waters, being arms of the sea, are within the acts of congress passed to regulate commerce. *The Propeller Commerce*, 1 Black, 574; *The Belfast*, 7 Wall., 624; *Gilman v. Philadelphia*, 3 id., 713 (§§ 1164-70, *infra*).

#### GILMAN v. PHILADELPHIA.

(3 Wallace, 713-744. 1865.)

STATEMENT OF FACTS.—The city of Philadelphia, being about to erect a bridge at Chestnut street across the Schuylkill river, Gilman, being a non-resident of the state and the owner of land and wharves above the proposed bridge, filed a bill in the circuit court for the eastern district of Pennsylvania, complaining of the contemplated structure as a public nuisance, and alleging special damage to himself. The bill was dismissed.

Opinion by MR. JUSTICE SWAYNE.

There is no contest between the parties about the facts upon which they respectively rely. The complainants are citizens of other states, and own a valuable and productive wharf and dock property above the site of the contemplated bridge. The river is navigable there for vessels drawing from eighteen to twenty feet of water. Commerce has been carried on in all kinds of vessels for many years to and from the complainants' property. The bridge will not be more than thirty feet above the ordinary high-water surface of the river, and hence will prevent the passage of vessels having masts. This will largely reduce the income from the property, and render it less valuable.

The defendants are proceeding to build the bridge under the authority of an act of the legislature of Pennsylvania. The Schuylkill river is entirely within her limits, and is "an ancient river and common highway of the state." For many years it has been navigable for masted vessels for the distance of about

seven and a half miles only from its mouth. At Market street, about five hundred feet above Chestnut, there is a permanent bridge without a draw over the same river, and no higher above the water than it is intended to elevate the bridge about to be built. A bridge at Market street was erected prior, perhaps, to the year 1809. It rendered the passage of masted vessels above that point impossible, and since that time comparatively few have appeared above the foot of Chestnut street. The river there has since been used chiefly as a highway for canal-boats. The injury to the property of the complainants will be entirely consequential. A large city is rising up on the opposite side of the river. The new bridge is called for by public convenience.

The case resolves itself into questions of law. At the threshold of the investigation we are met by the objection from the defendants, that the complainants, "not being specially interested in navigation, cannot intervene for its protection." It is said "that they are not the owners of licensed coasting vessels, and are not pilots nor navigators." As regards this objection, the case is not essentially different in principle from the Wheeling bridge case.

§ 1164. *A court of equity will interpose by injunction when irreparable injury to specific interests of individuals is about to follow a public nuisance.*

The further objection was also taken in that case, that, if a nuisance existed, it was of a public nature, and was an offense against the sovereignty whose laws were violated, and that the sovereign only could intervene for the correction of the evil. It was answered by the court, that wherever a public nuisance is productive of a specific injury to an individual, he may make it the foundation of an action at law, and if the injury would be irreparable, that a court of equity will interpose by injunction. The decision was not put in anywise upon the ground of the trustee character of the complainant. The state alleged that she had lines of improvements for the transportation of freight and passengers extending from the east to Pittsburg, and that by reason of the bridge about to be erected across the river at Wheeling, and the obstruction which it would cause to the navigation of that stream, business would be diverted from her works to other channels, and that the income from her works would thereby be greatly lessened, and their value diminished or destroyed. The court said: "The state of Pennsylvania is not a party in virtue of her sovereignty. It does not come here to protect the rights of its citizens, . . . nor can the state prosecute the suit upon the ground of any remote or contingent interest in herself. It assumes and claims, not an abstract right, but a direct interest, and that the power of this court can redress its wrongs, and save it from irreparable injury. . . . In the present case the rights assumed and relief prayed are in no respect different from those of an individual. From the dignity of the state the constitution gives to it a right to bring an original suit in this court, and this is the only privilege, if the right be established, which the state of Pennsylvania can claim in the present case."

In regard to the facts it was said: "And this injury is of a character for which an action at law could afford no adequate redress. It is of daily occurrence, and would require numerous, if not daily, prosecutions for the wrong done; and from the nature of that wrong, the compensation could not be measured or ascertained with any degree of precision. The effect would be, if not to reduce the tolls on these lines of transportation, to prevent their increase with the increasing business of the country. . . . In no case could a remedy be more hopeless than an action at common law. The structure complained of is permanent, and so are the public works sought to be pro-

tected. The injury, if there be one, is as permanent as the works from which it proceeds, and as are the works affected by it. And whatever injury there may now be will become greater in proportion to the increase of population and the commercial development of the country. And in a country like this, where there would seem to be no limit to its progress, the injury complained of would be far greater in its effects than under less prosperous circumstances."

The law upon the subject is learnedly and ably examined. The objections were overruled. Considerations of fact, of the same character with those adverted to, exist in the case before us, and the reasoning and conclusions there are alike applicable in both cases. Whatever might be our views upon the legal proposition, in the absence of this adjudication, we are, as we think, concluded by it. It is almost as important that the law should be settled permanently as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. "*Misera est servitus ubi lex est vaga aut incerta.*" This brings us to the examination of the merits of the case.

§ 1165. *Congress has power to regulate commerce between the states, and it is for it to determine when its full powers shall be used. Commerce includes navigation.*

The defendants assert that the act of the legislature, under which they are proceeding, justifies the building of the bridge. The complainants insist that such an obstruction to the navigation of the river is repugnant to the constitution and laws of the United States touching the subject of commerce.

These provisions of the constitution bear upon the subject: "Congress shall have power . . . to regulate commerce with foreign nations, among the several states, and with the Indian tribes; . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." "This constitution, and the laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

The act of the 18th of February, 1793, authorizes vessels enrolled and licensed according to its provisions to engage in the coasting trade. Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by congress. *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *infra*); *Corfield v. Coryell*, 4 Wash., 378. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, congress possesses all the powers which existed in the states before the adoption of the national constitution, and which have always existed in the parliament in England. It is for congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided. *United States v. New Bedford Bridge*, 1 Woodb. & M., 420, 421; *United States v. Coombs*, 12 Pet., 72; *City of New*



York v. Miln, 11 id., 102 (§§ 1274-83, *infra*). A license, under the act of 1793, to engage in the coasting trade, carries with it right and authority. "Commerce among the states" does not stop at a state line. Coming from abroad, it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable. Wherever "commerce among the states" goes, the power of the nation, as represented in this court, goes with it, to protect and enforce its rights. *Gibbons v. Ogden*, 9 Wheat., 1; *Steamboat Co. v. Livingston*, 3 Cow., 713. There can be no doubt that the coasting trade may be carried on beyond where the bridge in question is to be built.

§ 1166. *The powers respectively of the states and the general government.*

We will now turn our attention to the rights and powers of the states which are to be considered. The national government possesses no powers but such as have been delegated to it. The states have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the federal constitution. It has not been taken from the states. It must reside somewhere. They had it before the constitution was adopted, and they have it still. "When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Martin v. Waddell*, 16 Pet., 410.

In *Pollard v. Hagan*, 3 How., 230, this court said: "The right of eminent domain over the shores and the soil under the navigable waters, *for all municipal purposes, belongs exclusively to the states* within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. . . . But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but *municipal power*, subject to the constitution of the United States and *the laws which shall be made in pursuance thereof*."

In *Gibbons v. Ogden* it is said: "Inspection laws form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

Bridges are of the same nature with ferries, and are undoubtedly within the category thus laid down. *People v. S. & R. R. Co.*, 15 Wend., 113. The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the states. Whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated. Pilot laws are regulations of commerce; but if a state enact them in good faith, and not covertly for another purpose, they are not in con-

dict with the power "to regulate commerce" committed to congress by the constitution. *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How., 319 (§§ 1541-47, *infra*). In the *Wheeling bridge* case this court placed its judgment upon the ground "that congress had acted upon the subject, and had regulated the Ohio river, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same, and that the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of congress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the Ohio river, the act of the legislature of Virginia afforded no authority or justification. *It was in conflict with the acts of congress, which were the paramount law.*" 18 id., 430 (§§ 1203-12, *infra*).

The most important authority, in its application to the case before us, is *Willson v. Blackbird Creek Marsh Co.*, 2 Pet., 250 (§§ 1174-76, *infra*). Blackbird creek extends from the Delaware river into the interior of the state of Delaware. The legislature of the state passed an act whereby the company were "authorized and empowered to make and construct a good and sufficient dam across said creek, at such place as the managers, or a majority of them, shall find to be most suitable for the purpose," etc. The company proceeded to erect a dam, whereby the navigation of the creek was obstructed. The defendant, being the owner of a sloop of nearly a hundred tons, regularly enrolled and licensed under the laws of the United States, broke and injured the dam. The company brought an action of trespass against him in the supreme court of Delaware. The defendant pleaded that the place where the trespass was committed was "a public and common navigable creek, in the nature of a highway, in which the tides had always flowed and reflowed; and that all the citizens of the United States had a right, with sloops and other vessels, to navigate and pass over the same at all times at their pleasure," etc., and therefore, etc. The plaintiffs demurred. The supreme court sustained the demurrer and gave judgment in their favor. The court of appeals of that state affirmed the judgment. The case was brought into this court by a writ of error. In delivering the opinion of the court, Chief Justice Marshall said: "But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it; but this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens of which this court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several states.'"

He remarked that if "congress had passed any law which bore upon the subject the court would not feel much difficulty in saying that a state law, coming in conflict with such an act, would be void;" and added, in conclusion: "But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question. We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

This opinion came from the same "expounder of the constitution" who de-

livered the earlier and more elaborate judgment in *Gibbons v. Ogden*. We are not aware that the soundness of the principle upon which the court proceeded has been questioned in any later case. We can see no difference in principle between that case and the one before us. Both streams are affluents of the same larger river. Each is entirely within the state which authorized the obstruction. The dissimilarities are in facts which do not affect the legal question. Blackbird creek is the less important water, but it had been navigable, and the obstruction was complete. If the Schuylkill is larger and its commerce greater, on the other hand, the obstruction will be only partial, and the public convenience, to be promoted, is more imperative. In neither case is a law of congress forbidding the obstruction an element to be considered. The point that the vessel was enrolled and licensed for the coasting trade was relied upon in that case by the counsel for the defendant. The court was silent upon the subject. A distinct denial of its materiality would not have been more significant. It seems to have been deemed of too little consequence to require notice. Without overruling the authority of that adjudication we cannot, by our judgment, annul the law of Pennsylvania.

§ 1167. *It is for the municipal power to weigh the considerations for and against the erection of a bridge.*

It must not be forgotten that bridges, which are connecting parts of turn-pikes, streets and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the nation.

§ 1168. *Concurrent and independent powers of the states.*

The states may exercise concurrent or independent power in all cases but three: 1. Where the power is lodged exclusively in the federal constitution. 2. Where it is given to the United States and prohibited to the states. 3. Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively. *Houston v. Moore*, 5 Wheat., 49 (§§ 161-190, *supra*); *Federalist*, No. 32.

The power here in question does not, in our judgment, fall within either of these exceptions. "It is no objection to distinct substantive powers that they may be exercised upon the same subject." It is not possible to fix definitely their respective boundaries. In some instances their action becomes blended; in some, the action of the state limits or displaces the action of the nation; in others, the action of the state is void, because it seeks to reach objects beyond the limits of state authority.

A state law, requiring an importer to pay for and take out a license before he should be permitted to sell a bale of imported goods is void (*Brown v. State of Maryland*, 12 Wheat., 419; §§ 1466-70, *infra*), and a state law which requires the master of a vessel, engaged in foreign commerce, to pay a certain sum to a state officer on account of each passenger brought from a foreign country into the state, is also void. *Passenger Cases*, 7 How., 273 (§§ 1284-1335, *infra*). But a state in the exercise of its police power, may forbid spirit-

uous liquor imported from abroad, or from another state, to be sold by retail or to be sold at all without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper. License Cases, 5 id., 504 (§§ 1481–1518, *infra*). Under quarantine laws, a vessel registered, or enrolled and licensed, may be stopped before entering her port of destination, or be afterwards removed and detained elsewhere, for an indefinite period; and a bale of goods, upon which the duties have or have not been paid, laden with infection, may be seized under “health laws,” and if it cannot be purged of its poison, may be committed to the flames. The inconsistency between the powers of the states and the nation, as thus exhibited, is quite as great as in the case before us; but it does not necessarily involve collision or any other evil. None has hitherto been found to ensue. The public good is the end and aim of both.

§ 1169. *The possible abuse of a power by the states is no proof that it does not exist.*

If it be objected that the conclusion we have reached will arm the states with authority potent for evil, and liable to be abused, there are several answers worthy of consideration. The possible abuse of any power is no proof that it does not exist. Many abuses may arise in the legislation of the states which are wholly beyond the reach of the government of the nation. The safeguard and remedy are to be found in the virtue and intelligence of the people. They can make and unmake constitutions and laws; and from that tribunal there is no appeal. If a state exercise unwisely the power here in question, the evil consequences will fall chiefly upon her own citizens. They have more at stake than the citizens of any other state. Hence, there is as little danger of the abuse of this power as of any other reserved to the states. Whenever it shall be exercised openly or covertly for a purpose in conflict with the constitution or laws of the United States, it will be within the power, and it will be the duty, of this court to interpose with a vigor adequate to the correction of the evil. In the Pilot case, the dissenting judge drew an alarming picture of the evils to rush in at the breach made, as he alleged, in the constitution. None have appeared. The stream of events has since flowed on without a ripple due to the influence of that adjudication.

§ 1170. *Congress may, by general or special laws, regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them.*

Lastly, congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority both the legislative and judicial power of the nation are supreme. A different doctrine finds no warrant in the constitution, and is abnormal and revolutionary. Since the adoption of the constitution there has been but one instance of such legislative interposition; that was to save, and not to destroy. The Wheeling bridge was legalized, and a decree of this court was, in effect, annulled by an act of congress. The validity of the act, under the power “to regulate commerce,” was distinctly recognized by this court in that case. This is, also, the only instance, occurring within the same period, in which the case has been deemed a proper one for the exercise, by this court, of its remedial power.

The defendants are proceeding in no wanton or aggressive spirit. The authority upon which they rely was given, and afterwards deliberately renewed

by the state. The case stands before us as if the parties were the state of Pennsylvania and the United States. The river, being wholly within her limits, we cannot say the state has exceeded the bounds of her authority. Until the dormant power of the constitution is awakened and made effective, by appropriate legislation, the reserved power of the states is plenary, and its exercise in good faith cannot be made the subject of review by this court. It is not denied that the defendants are justified if the law is valid. We find nothing in the record which would warrant us in disturbing the decree of the circuit court, which is, therefore, affirmed with costs.

MR. JUSTICE CLIFFORD, with whom concurred JUSTICES WAYNE and DAVIS, rendered a dissenting opinion, which concluded as follows:

"Conclusion is, that congress has regulated the navigation of this river, and that the state law under which the respondents attempt to justify is in conflict with those regulations, and therefore is void, and affords no justification to the respondents. Admitting the facts to be so, then the complainants are entitled to recover even upon the principle maintained in the opinion of the majority of the court."

POUND v. TURCK.

(5 Otto, 459-465. 1877.)

ERROR to U. S. Circuit Court, Western District of Wisconsin.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—This suit, brought by Turck and Borland, assignees in bankruptcy of French, Leonard & Co., is founded upon allegations that the bankrupts, being lumbermen engaged in that business on the Chippewa river, in Wisconsin, were seriously damaged by the delay of a raft of lumber, shingles and pickets, in said river, and by the breaking of the raft; all of which was attributable to obstructions placed in said river by Pound, Halbert & Co., the plaintiffs in error, who were defendants below. The defendants pleaded the general issue, and a verdict was rendered against them, on which the judgment was founded to which this writ of error is taken.

The bill of exceptions is a very imperfect one; and two exceptions in regard to the admission of evidence are so unimportant that we do not think it necessary to notice them further than to say that we see no error in them. The bill of exceptions shows, however, that there was evidence tending to prove that the dam and boom which constituted the principal obstruction in the river, to which the loss of plaintiffs' assignees was due, were built under authority of an act of the Wisconsin legislature, to wit, c. 235, Session Laws of 1857, approved March 5th of that year. This statute is by its last section declared to be a public act, which shall be favorably construed in all courts. Section 7 of the act authorizes "the erection of one or more dams at a given point across said river, and the building and maintaining of a boom or booms, with sufficient piers, and in such manner and form, and with such strength, as will stop and hold all logs and other things which may float in said river, which boom or booms shall be so arranged as to permit the passage of boats at all times; and at times of running lumber, a sufficient space shall be kept open in some convenient place for the passage of rafts, and the said dam or dams shall be built with suitable slides for the running of lumber in rafts over the same, and the said dam or dams and boom or booms shall be so constructed as not to obstruct

the running of lumber rafts in said river." Private Laws of Wisconsin of 1857, p. 538.

The counsel for defendants seem to have made an attempt to secure from the court an instruction that, if the injury to plaintiffs' raft was caused by the boom or dam built under this statute, they were not liable if they constructed it in compliance with its demands; but the language of the prayer alone is too vague to predicate error of its refusal. But the bill of exceptions proceeds to say that, having refused these prayers, the court instructed the jury upon those points as follows: 1. That the defendants are not liable to private action for injury to navigation while acting under legislative authority, provided that they have kept within the authority granted, and have been guilty of no negligence, unless their works materially obstruct the navigation of the river. 2. If the defendants, in erecting the piers and booms mentioned in the plaintiffs' complaint, did so under authority given by the legislature of the state of Wisconsin, in which state the Chippewa river lies, and put therein in the manner provided by the act giving them authority, they are not liable in damages to the plaintiffs for any injury caused by reason of their doing the thing authorized. 3. If you find the stream navigable within the rules I have laid down for determining that question, you will next proceed to determine whether the piers alleged and conceded to have been placed on the river at Chippewa Falls were a material obstruction to the navigation thereof. If they were, the defendants had no right to place them there, nor could the legislature confer authority upon them to do so.

If there were no other objection to these three propositions in the charge of the court, it appears to us that they must have been confusing to the minds of the jury. The first and the third propositions distinctly enough declare that, if the piers and booms materially obstructed the navigation of the river, the act of the legislature was no protection; while the second as distinctly affirms that if they were built in the manner provided by the act giving them authority, they are not liable for any injury arising from them when so built. As they appear to us, these propositions, given each as an independent one on that subject, are necessarily contradictory, and we cannot tell which of them the jury accepted as the foundation of their verdict. If the second proposition alone had been given, the only inquiry of the jury on that branch of the case would have been as to the conformity of the structures to the directions of the statute. If the other two were to govern, then the jury must inquire whether those structures were a material obstruction to the general navigation of the river. That these inquiries were not the same is very clear, for no one can read the statute without perceiving that it did authorize a material obstruction to the general navigation of the river. It authorized the construction of dams entirely across the stream, and it authorized booms, with sufficient piers, across the stream to stop and hold all logs and other things which may float in said river. It is a waste of words to attempt to prove that this would create a material obstruction to the navigation of the river by every species of watercraft. The fact that directions are given to facilitate the passage of these dams and piers by boats and rafts only shows that the evil caused by the obstructions was to be mitigated as far as possible consistently with their erection, and not that they were so to be built as to present no material obstruction to navigation.

Taking all the instructions together, and in connection with the prayer of the defendants refused by the court, we are of opinion that the jury must have

understood that if the structures of defendants were a material obstruction to the general navigation of the river, the statute of the state afforded them no defense, though they were built in strict conformity to its provisions. We are confirmed in the belief that we have correctly construed the language of the court by the argument of counsel in support of the charge, which asserts the want of power in the state to pass the act here relied on. This was unquestionably the opinion of the court as given to the jury, and its soundness is the principal matter to be considered by us. This want of power is supposed to rest on the repugnance of the statute to that provision of the constitution which confers upon congress the authority "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The proposition is not a new one in this court, and cannot be sustained as applicable to the case before us without overruling many well-considered decisions, no one of which has ever been overturned, though the doctrine announced has been occasionally questioned.

The Chippewa river is a small stream lying wholly within the state of Wisconsin, but emptying its waters into the Mississippi. Without the aid of the constitution of Wisconsin, or the decision of its supreme court, or the third section of the enabling act of 1846, by which congress authorized the formation of a state government, we may concede that the stream, though small, is a navigable river of the United States, and protected by all the acts of congress and provisions of the constitution applicable to such waters.

§ 1171. *Concurrent powers of the states under the commerce clause.*

The principle established by the decisions to which we have referred is, that, in regard to the powers conferred by the commerce clause of the constitution, there are some which, by their essential nature, are exclusive in congress, and which the states can exercise under no circumstances; while there are others which, from their nature, may be exercised by the states until congress shall see proper to cover the same ground by such legislation as that body may deem appropriate to the subject. Of this class are pilotage and other port regulations, *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How., 299 (§§ 1541-47, *infra*), bridges across navigable streams, *Gilman v. Philadelphia* (3 Wall., 713; §§ 1164-70, *supra*), and, as specially applicable to the case before us, to erect dams across navigable streams, *Willson v. Blackbird Creek Marsh Co.*, 2 Pet., 245 (§§ 1174-76, *infra*). This general doctrine was very fully examined and sustained in *Gilman v. Philadelphia*, 3 Wall., 713, and again in *Crandall v. State of Nevada*, 6 id., 35 (§§ 1269-73, *infra*).

§ 1172. *A state law authorizing the erection of a dam across a navigable river is not unconstitutional, if there be no congressional legislation on the subject.*

As we have already said, the Blackbird Creek Case is directly applicable to the one before us; and as it has never been overruled, but, on the contrary, though much criticised, has always been sustained, it is alone sufficient to control this one. In that case, the legislature of the state of Delaware authorized the construction of a dam across the creek for the purpose of reclaiming some marsh land, and improving the health of its inhabitants. "But the measure authorized by the statute," said Chief Justice Marshall, "stops a navigable creek, and must be supposed to abridge the rights of those accustomed to use it." He then says that if congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control state legislation over the small navigable streams into which the tide flows, the state law would be void; but that as no such action

had been taken by congress, the act of the state was not repugnant to the power to regulate commerce in its dormant state.

In the case of *Gilman v. Philadelphia*, the plaintiff was owner of a wharf on the Schuylkill river in the city of Philadelphia, at a point where that river had been navigable for time immemorial by a large class of vessels. The state of Pennsylvania passed a law in 1857 authorizing the city to build a bridge across that stream just below plaintiff's wharf, and between it and the mouth of the river. There was no question that this bridge would wholly exclude a large part of the vessels which had theretofore navigated the Schuylkill up to plaintiff's wharf. He applied to the circuit court of the United States for an injunction, and that court dismissed his bill. On appeal to this court the decree was affirmed, on the express ground that in the absence of legislation by congress the act of the Pennsylvania legislature was not repugnant to the commerce clause of the constitution.

§ 1173. *A person is not liable for obstructing the navigation of a river when authorized to do so by a statute of the state, there being no act of congress on the subject.*

The present case falls directly within the principle established by these cases, and aptly illustrates its wisdom. There are within the state of Wisconsin, and perhaps other states, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water-carriage is as outlets to saw-logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislatures. It is obvious from these remarks that the court, in its charge to the jury and in refusing the prayer of plaintiff, did not give to the act of the legislature of Wisconsin the effect to which it was entitled as a defense in the action.

It is argued by counsel that there is no evidence connecting the defendants with the authority conferred by that statute. But as the record does not purport to contain all the evidence, and as the charge of the court is based upon the idea that there was evidence to go to the jury on that subject, so much so that the most important part of the charge relates to that matter, we must presume there was such evidence. It is also insisted that the record shows no exception to the charge of the court. But the objection is hypercritical. A close examination of the bill of exceptions satisfies us that the plaintiffs in error did except both to the refusal to grant the instruction prayed for and to those given by the court on the same points. For the error in the charge of the court in that matter the judgment will be reversed and a new trial awarded.



## WILLSON v. BLACKBIRD CREEK MARSH COMPANY.

(2 Peters, 245-252. 1829.).

ERROR to the High Court of Errors and Appeals of Delaware.

STATEMENT OF FACTS.—This was an action of trespass for breaking down a dam, erected across Blackbird Marsh Creek under authority from the state of Delaware. The parties committing the alleged trespass were the owners of a sloop, regularly licensed and enrolled for the coasting trade, and they justified on the ground that the creek was a navigable water, in which the tide ebbed and flowed.

§ 1174. *To give the supreme court jurisdiction of appeals and writs of error from the highest tribunals of a state, the record need not show in terms that the constitution or laws of the United States were drawn in question.*

Opinion by MARSHALL, C. J.

The defendants in error deny the jurisdiction of this court, because, they say, the record does not show that the constitutionality of the act of the legislature, under which the plaintiff claimed to support his action, was drawn into question. Undoubtedly, the plea might have stated in terms that the act, so far as it authorized a dam across the creek, was repugnant to the constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court. That question must have been discussed and decided.

The plaintiffs sustain their right to build a dam across the creek by the act of assembly. Their declaration is founded upon that act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly. The plea does not controvert the existence of the act, but denies its capacity to authorize the construction of a dam across a navigable stream, in which the tide ebbs and flows; and in which there was, and of right ought to have been, a certain common and public way in the nature of a highway. This plea draws nothing into question but the validity of the act; and the judgment of the court must have been in favor of its validity. Its consistency with, or repugnancy to, the constitution of the United States, necessarily arises upon these pleadings, and must have been determined. This court has repeatedly decided in favor of its jurisdiction in such a case. *Martin v. Hunter*, 1 Wheat., 355; *Miller v. Nicholls*, 4 Wheat., 311; and *Williams v. Norris*, 12 Wheat., 117, are expressly in point. They establish, as far as precedents can establish anything, that it is not necessary to state in terms, on the record, that the constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the twenty-fifth section of the judicial act, if the record shows that the constitution or a law or a treaty of the United States must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favor of the party claiming under such law. The jurisdiction of the court being established, the more doubtful question is to be considered, whether the act incorporating the Blackbird Creek Marsh Company is repugnant to the constitution, so far as it authorizes a dam across the creek. The plea states the creek to be navigable, in the nature of a highway, through which the tide ebbs and flows.

§ 1175. *A state may authorize the erection of a dam across a creek which is navigable from the sea.*

The act of assembly by which the plaintiffs were authorized to construct their dam shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States "to regulate commerce with foreign nations and among the several states."

§ 1176. — *unless congress has acted on the subject.*

If congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states, we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question. We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject. There is no error, and the judgment is affirmed.

#### COUNTY OF MOBILE v. KIMBALL.

(12 Otto, 691-707. 1880.)

APPEAL from U. S. Circuit Court, Southern District of Alabama.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—The several positions taken by the appellant for the reversal of the decree of the circuit court may be resolved into these four: 1st, that the act of the legislature of Alabama of February 16, 1867, "to provide for the improvement of the river, bay and harbor of Mobile," is invalid, in that it conflicts with the commercial power vested in congress; 2d, that if the act be not, for this reason, invalid, the expenses for the work authorized by it could not, under the constitution of the state then in force, be imposed upon the county of Mobile, the work being for the benefit of the whole state; 3d, that the right of the complainants to relief is barred by a previous adjudication in the courts of the state against their claim; and 4th, that the case presented by the bill is not one for the cognizance of a court of equity. Each of these positions merits special consideration.

1. The act of February 16, 1867, created a board of commissioners for the improvement of the river, harbor and bay of Mobile, and required the president of the commissioners of revenue of Mobile county to issue bonds to the amount of \$1,000,000, and deliver them, when called for, to the board, to meet the expenses of the work directed. The board was authorized to apply the bonds, or their proceeds, to the cleaning out, deepening and widening of the river, harbor and bay of Mobile, or any part thereof, or to the construction of an artificial harbor in addition to such improvement. In June, 1872, the board of commissioners entered into a contract with the complainants, Kimball and Slaughter, to dredge and cut a channel through a designated bar in the bay, of specified width, depth and distance, at a named price per cubic yard of material excavated and removed, and to receive in payment the bonds of the county, issued under the act mentioned, at the rate of eighty-two and a half cents on the dollar. In pursuance of this contract, the work agreed upon was at once undertaken by the complainants, and was completed by them in March, 1873, and accepted by the board through its authorized engineer. The amount due to them was paid, with the exception of seventeen bonds. The board gave them a certificate that they were entitled to that number of bonds, and, after some delay, delivered eleven to them. It is to obtain a delivery of the remaining six, or payment of their value, that the present suit is brought.

§ 1177. *State laws for the improvement of harbors are not unconstitutional if they do not conflict with acts of congress.*

The objection that the law of the state, in authorizing the improvement of the harbor of Mobile, trenches upon the commercial power of congress, assumes an exclusion of state authority from all subjects in relation to which that power may be exercised, not warranted by the adjudications of this court, notwithstanding the strong expressions used by some of its judges. That power is indeed without limitation. It authorizes congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several states, and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the states connecting with them, falls within the power. The subjects, indeed, upon which congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and citizens and against the products and citizens of other states. And it is a matter of public history that the object of vesting in congress the power to regulate commerce

with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation.

Of the class of subjects local in their nature, or intended as mere aids to commerce, which are best provided for by special regulations, may be mentioned harbor pilotage, buoys, and beacons to guide mariners to the proper channel in which to direct their vessels. The rules to govern harbor pilotage must depend in a great degree upon the peculiarities of the ports where they are to be enforced. It has been found by experience that skill and efficiency on the part of local pilots is best secured by leaving this subject principally to the control of the states. Their authority to act upon the matter and regulate the whole subject, in the absence of legislation by congress, has been recognized by this court in repeated instances. In *Cooley v. Board of Wardens of Port of Philadelphia*, the court refers to the act of congress of 1789, declaring that pilots should continue to be regulated by such laws as the states might respectively thereafter enact for that purpose, and observes that "it manifests the understanding of congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the states and of the national government has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience and conformed to local wants." 12 How., 299, 320 (§§ 1541-47, *infra*).

Buoys and beacons are important aids, and sometimes are essential to the safe navigation of vessels in indicating the channel to be followed at the entrance of harbors and in rivers, and their establishment by congress is undoubtedly within its commercial power. But it would be extending that power to the exclusion of state authority to an unreasonable degree to hold that whilst it remained unexercised upon this subject, it would be unlawful for the state to provide the buoys and beacons required for the safe navigation of its harbors and rivers, and in case of their destruction by storms or otherwise it could not temporarily supply their places until congress could act in the matter and provide for their re-establishment. That power which every state possesses, sometimes termed its police power, by which it legislates for the protection of the lives, health and property of its people, would justify measures of this kind.

The uniformity of commercial regulations, which the grant to congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where, from the nature of the subject or the sphere of its operation, the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of congress, for when that acts the state authority is superseded. Inaction of congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority. The improvement of harbors, bays and navigable rivers within the states falls within this last category of cases. The control of congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon

by the removal of obstructions to their navigability or by other legitimate improvement. The states have as full control over their purely internal commerce as congress has over commerce among the several states and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government. Legislation of the states for the purposes and within the limits mentioned do not infringe upon the commercial power of congress, and so we hold that the act of the state of Alabama of February 16, 1867, to provide for the "improvement of the river, bay and harbor of Mobile," is not invalid.

§ 1178. *Adjudications as to the powers of congress over commerce and navigation.*

There have been, it is true, expressions by individual judges of this court, going to the length that the mere grant of the commercial power, anterior to any action of congress under it, is exclusive of all state authority; but there has been no adjudication of the court to that effect. In the opinion of the court in *Gibbons v. Ogden*, the first and leading case upon the construction of the commercial clause of the constitution, and which opinion is recognized as one of the ablest of the great chief justice then presiding, there are several expressions which would indicate, and his general reasoning would tend to the same conclusion, that in his judgment the grant of the commercial power was of itself sufficient to exclude all action of the states, and it is upon them that the advocates of the exclusive theory chiefly rely; and yet he takes care to observe that the question was not involved in the decision required by that case. "In discussing the question whether this power is still in the states," he observes that, "in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which congress deemed it proper to make are now in full operation. The sole question is, Can a state regulate commerce with foreign nations and among the several states while congress is regulating it?" And the decision was necessarily restricted by the limitations of the question presented. It determined that the grant of power by the constitution, accompanied by legislation under it, operated as an inhibition upon the states from interfering with the subject of that legislation. The acts of New York giving to Livingston and Fulton an exclusive right to navigate all the waters within its jurisdiction, with vessels propelled by steam for a certain period, being in collision with the laws of congress regulating the coasting trade, were, therefore, adjudged to be unconstitutional. This judgment was rendered in 1824. 9 Wheat., 1 (§§ 1183-1201, *infra*). Some years later (1829) the case of *Willson v. Blackbird Creek Marsh Co.* came before the court. There a law of Delaware authorizing the construction of a bridge over one of its small navigable streams, which obstructed the navigation of the stream, was held not to be repugnant to the commercial power of congress. The court, Chief Justice Marshall delivering its opinion, placed its decision entirely upon the absence of any congressional legislation on the subject. Its language was: "If congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control

state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states,—we should not feel much difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states,—a power which has not been so exercised as to affect the question.” 2 Pet., 245, 252 (§§ 1174–76, *supra*).

In the License Cases, which were before the court in 1847 (5 How., 504, §§ 1481–1518, *infra*), there was great diversity of views in the opinions of the different judges upon the operation of the grant of the commercial power of congress in the absence of congressional legislation. Extreme doctrines upon both sides of the question were asserted by some of the judges, but the decision reached, so far as it can be viewed as determining any question of construction, was confirmatory of the doctrine that legislation of congress is essential to prohibit the action of the states upon the subjects there considered. But in 1851, in the case of *Cooley v. Board of Wardens of Port of Philadelphia*, to which we have already referred, the attention of the court appears to have been for the first time drawn to the varying and different regulations required by the different subjects upon which congress may legislate under the commercial power; and from this consideration the conclusion was reached, that, as some of these subjects are national in their nature, admitting of one uniform plan or system of regulation, whilst others, being local in their nature or operation, can be best regulated by the states, the exclusiveness of the power in any case is to be determined more by the nature of the subject upon which it is to operate than by the terms of the grant, which, though general, are not accompanied by any express prohibition to the exercise of the power by the states. The decision was confined to the validity of regulations by the states of harbor pilotage; but the reasoning of the court suggested as satisfactory a solution as perhaps could be obtained of the question which had so long divided the judges. The views expressed in the opinion delivered are followed in *Gilman v. Philadelphia*, 3 Wall., 713 (§§ 1164–70, *supra*), and are mentioned with approval in *Crandall v. State of Nevada*, 6 id., 35 (§§ 1269–73, *infra*). In the first of these cases the court, after stating that some subjects of commerce call for uniform rules and national legislation, and that others can “be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively,” says, “whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated.” This doctrine was subsequently recognized in the case of *Welton v. State of Missouri*, 91 U. S., 275 (§§ 1379–83, *infra*), in *Henderson v. Mayor of New York*, 92 id., 259 (§§ 1336–42, *infra*), and in numerous other cases; and it may be considered as expressing the final judgment of the court.

Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined, and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules

applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce.

§ 1179. *The act of February 16, 1867, of the legislature of Alabama, authorizing the taxation of the county of Mobile for the improvement of Mobile Bay, is not repugnant to the constitution of Alabama.*

2. The second objection of the appellant to the decree of the circuit court is equally as untenable as the first. The question of the validity of the act of February 16, 1867, under the constitution of Alabama at the time in force, was before the supreme court of the state in 1871. It was contended that the act contravened the article which forbade the taking of private property for public use without just compensation, or for private use, or the use of corporations other than municipal, without the consent of the owner, and the article which restrained the legislature from delegating power to levy taxes to individuals or private corporations. The court held that the act was not open to objection on either of these grounds, except perhaps in the clause which authorized the board of commissioners to assess dues or tolls to be collected on vessels or water-craft; and if that clause could be deemed a delegation of the taxing power under the article mentioned, that portion only of the act was invalid. The issue by the president and commissioners of revenue of Mobile county of bonds for the improvement of the river, bay and harbor of Mobile was not a taking of private property for public use, within the meaning of the constitutional clause. It was a loan of the credit of the county for a work public in its character, designed to be of general benefit to the state, but more especially and immediately to the county. The expenses of the work were of course to be ultimately defrayed by taxation upon the property and people of the county. But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the constitution. Taxation only exacts a contribution from individuals of the state or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But when private property is taken for public use, the owner receives full compensation. The taking differs from a sale by him only in that the transfer of title may be compelled, and the amount of compensation be determined by a jury or officers of the government appointed for that purpose. In the one case, the party bears only a share of the public burdens; in the other, he exchanges his property for its equivalent in money. The two things are essentially different.

§ 1180. *It is competent for a legislature, if not restrained by the constitution of the state, to tax one county for improvements for the benefit of the whole state.*

The objection to the act here raised is different from that taken in the state court. Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole state. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other

particular subdivisions of the state, or lay the greater share or the whole upon that county or portion of the state specially and immediately benefited by the expenditure.

It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole state, among all its counties. But this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive state legislation. The judicial power of the federal government can only be invoked when some right under the constitution, laws or treaties of the United States is invaded. In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests.

§ 1181. *The dismissal of a bill "without prejudice" constitutes no adjudication, nor any bar to a subsequent action for the same cause.*

3. The objection that the right of the complainants to relief is barred by a previous adjudication in the courts of the state against their claim arises in this wise: After the complainants had performed their work on the harbor of Mobile under the contract with the harbor commissioners' of June, 1872, and the work had been approved and accepted, the legislature passed the act of April 19, 1873, to regulate the further proceedings of the board, restricting the issue of bonds to the amount, including those already issued, of \$200,000, and declaring that the harbor board should not, under any pretense whatever, be entitled to receive bonds to any greater amount. Bonds to that amount had already been delivered to the board, and for six of them, the number to which they were entitled, the complainants applied. The delivery of the bonds being refused, they brought suit against the county of Mobile to obtain them or their value. Two grounds were alleged on which the responsibility of the county was asserted: one, that the harbor board had ceased to have anything to do with the improvement of the river, bay and harbor of Mobile, and had turned over all the money and bonds left in its possession to the officials of the county; the other, that the county, through its officials, had bought from the harbor board thirty-one of the two hundred bonds issued, at a price less than their market value, and had refused to deliver to the complainants the six due to them which they had demanded.

The district court gave a decree for the complainants, but the supreme court reversed it, holding that upon the first ground the complainants were mistaken as to the situation of the harbor board, and that it continued to exist for the purpose of winding up and settling its business; and upon the second ground, that although thirty-one of the bonds had been purchased as stated, they had been canceled before the complainants made the demand for six of them; and it was shown by the county that there still remained with the harbor board unaccounted for twenty-three of the two hundred bonds, which were more than sufficient to pay the complainants and other debts which the board owed. The court therefore decided that the delinquency complained of was that of the harbor board and not of the county; that the only obligations imposed upon the county were that it should issue its bonds upon the demand of the harbor board, and pay them according to their stipulations; and as it appeared



that the county officials had delivered to the board the whole amount of the bonds demanded, and that this amount was ample for the fulfilment of the obligations contracted for, the suit could not be maintained. The decree was, therefore, reversed and the bill dismissed, but *without prejudice*,—a condition which prevented the adjudication from operating as a bar to the same claim, if the complainants could in another suit obviate the defects of the existing bill. In the present suit they have obviated these defects. They allege and prove that the harbor board had disposed of all the bonds it had received before the passage of the act of April 19, 1873, restricting the number to be issued, and that it had turned over to the officials of the county neither bonds nor proceeds to meet the demand of the complainants. The two suits, though seeking the same relief, rest upon a different state of facts, and the adjudication in the one constitutes, therefore, no bar to a recovery in the other.

§ 1182. *A court of equity has jurisdiction when specific performance of a contract is the proper remedy, but if that cannot be effected will grant alternative relief.*

4. But it is finally objected that the case presented by the bill is not one for the cognizance of a court of equity. This objection is important only from the supposed effect of the decision of the supreme court of the state in the first suit against the county brought by the complainants. It appears to have been taken for granted by counsel, and also by the court below, that the supreme court of the state had decided that the harbor board was not the agent of the county in making the contract with the complainants. We do not so read its opinion. It only says that the board was created by the general assembly of the state, and was not an agent *appointed* by the county of Mobile. It does not state that the board was not an agent of the county, but only that its appointment was not from the county, and that it drew its existence and authority from the statute of the state. It is not necessary to constitute an agency of a political subdivision of a state that its officials should be elected by its people or be appointed with their assent. It is enough to give them that character that, however appointed, they are authorized by law to act for the county, district or other political subdivision. Here, the harbor board, created by a law of the state, was authorized to make contracts for a public work in which the county was specially interested, and by which it would be immediately and directly benefited, and to require obligations of the county to meet the expenses incurred. It is a mere battle of words to contend that it was, or was not, an agent of the county because its members were appointed by some exterior authority. It is enough in this case that by force of the law of its creation it could bind the county for work for which it contracted. Having thus bound the county, the contractors are entitled to the bonds stipulated, or their equivalent in money. If, for any cause, the repeal of the law creating the harbor board, or the refusal of its members or other officials to act, the contract cannot be specifically enforced, a court of equity will order compensation in damages from the party ultimately liable. That court will free the case from all technical embarrassments, to the end that justice may be done to those who have trusted to the law, and the responsibility of parties receiving benefits under it. The case here is not different in principle from the ordinary case of a party being unable to comply with his contract when specific performance is demanded. If, for example, there be a contract for the purchase of land with which the purchaser has complied, but

in which the vendor has failed, a court of equity will take jurisdiction; and if it be seen that the vendor, from subsequent sales or otherwise, cannot comply with a decree for a specific performance, the court will adjudge compensation in damages. So, here, the court will grant the relief which the complainants, under their contract, are entitled to have, if such relief can be obtained from the county; but if by reason of intervening obstacles since the contract was made, whether arising from laches or default of its officials or repealing legislation, this cannot be secured, an alternative and compensatory decree, that is, one for a money equivalent in the form of damages, will be directed. And as this has been done in the present case, the decree is affirmed.

GIBBONS *v.* OGDEN.

(9 Wheaton, 1-240. 1824.)

ERROR to the Court for the Trial of Impeachments and Correction of Errors of the State of New York.

STATEMENT OF FACTS.—The state of New York granted to Robert R. Livingston and Robert Fulton the exclusive privilege, for a term of years, of navigating the waters of the state with boats moved by fire or steam. Ogden acquired the right of navigating certain waters through an assignment from Livingston and Fulton. He filed a bill for an injunction against Gibbons, alleging that he was employing two steamboats in violation of complainant's exclusive privileges. The defense of Gibbons was that his vessels were duly enrolled and licensed for the coasting trade, under the act of February 18, 1793. The injunction was made perpetual in the state courts.

Opinion by MARSHALL, C. J.

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains are repugnant to the constitution and laws of the United States. They are said to be repugnant—1. To that clause in the constitution which authorizes congress to regulate commerce. 2. To that which authorizes congress to promote the progress of science and useful arts.

The state of New York maintains the constitutionality of these laws; and their legislature, their council of revision and their judges have repeatedly concurred in this opinion. It is supported by great names—by names which have all the titles to consideration that virtue, intelligence and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government.

As preliminary to the very able discussions of the constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a

legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected. This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent,—then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can inure solely to the benefit of the grantee; but is an investment of power for the general advantage in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred. The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

§ 1183. *The power of congress, under the constitution, to regulate commerce includes the power to regulate navigation.*

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and

selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter. If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late. If the opinion that "commerce," as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted. The ninth section of the first article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word commerce. Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade. That it may be, and often is, used as an instrument of war cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition

preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case, an embargo is no more a war measure than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen. When congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was, the protection of commerce, and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war measure. The persevering earnestness and zeal with which it was opposed, in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this. Yet they never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation, of commerce. In terms, they admitted the applicability of the words used in the constitution to vessels; and that, in a case which produced a degree and an extent of excitement, calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject.

§ 1184. *Congress has power to regulate all foreign commerce.*

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation, within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce." To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes." It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it.

§ 1185. *The power of congress "to regulate commerce among the several states" embraces all commerce in which more than one state is concerned, but does not extend to the exclusively internal commerce of a state.*

The subject to which the power is next applied is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and

which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

§ 1186. *The power of congress "to regulate commerce with foreign nations and among the several states" extends into and within the territorial jurisdiction of the several states.*

But in regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of congress may be exercised within a state. This principle is, if possible, still more clear when applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition, between two adjoining states, commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a state. The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

§ 1187. *The power to regulate commerce is the power to prescribe rules.*

We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be

exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments. The power of congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

§ 1188. *Of the concurrent power of the states in the regulation of commerce.*

But it has been urged with great earnestness that, although the power of congress to regulate commerce with foreign nations, and among the several states, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the states may severally exercise the same power within their respective jurisdictions. In support of this argument it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description. The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no *residuum*; that a grant of the whole is incompatible with the existence of a right in another to any part of it. Both parties have appealed to the constitution, to legislative acts and judicial decisions; and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

§ 1189. *The powers of taxation and of regulation of commerce are not analogous, so far as the respective powers of the state and federal governments are concerned.*

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the states are transferred to the government of the Union, yet the state governments remain and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time.

We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes they are not doing what congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which congress deemed it proper to make are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the states while congress is regulating it? The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the tenth section as supporting their opinion. They say, very truly, that limitations of a power furnish a strong argument in favor of the existence of that power, and that the section which prohibits the states from laying duties on imports or exports proves that this power might have been exercised had it not been expressly forbidden; and, consequently, that any other commercial regulation not expressly forbidden, to which the original power of the state was competent, may still be made. That this restriction shows the opinion of the convention that a state might impose duties on exports and imports if not expressly forbidden will be conceded; but that it follows as a consequence, from this concession, that a state may regulate commerce with foreign nations and among the states cannot be admitted.

§ 1190. — *analogy of the power to lay duties.*

We must first determine whether the act of laying "duties or imposts on imports or exports" is considered in the constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the eighth section: "Congress shall have power to lay and collect taxes, duties, imposts and excises;" and before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is, that all duties, imposts and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power not before conferred. The constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy



taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the states on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the states to levy taxes, not from the questionable power to regulate commerce. "A duty of tonnage" is as much a tax as a duty on imports or exports; and the reason which induced the prohibition of those taxes extends to this also. This tax may be imposed by a state with the consent of congress; and it may be admitted that congress cannot give a right to a state in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on congress, without affording any implication respecting a power to regulate commerce. It is true that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce, but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the states from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed. These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

§ 1191. — *analogy of inspection laws.*

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution as being passed in the exercise of a power remaining with the states. That inspection laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to a general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

No direct general power over these objects is granted to congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that

may also be employed by a state, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If congress license vessels to sail from one port to another in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. So, if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality. In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

§ 1192. — *analogy of quarantine laws.*

The acts of congress, passed in 1796 and 1799 (1 Stats. at Large, 474, 619), empowering and directing the officers of the general government to conform to, and assist in, the execution of the quarantine and health laws of a state, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a state may rightfully regulate commerce with foreign nations, or among the states; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of congress, and are considered as flowing from the acknowledged power of a state to provide for the health of its citizens. But as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by, the laws of the United States made for the regulation of commerce, congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states. But in making these provisions the opinion is unequivocally manifested that congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce.

§ 1193. — *the slave trade act of 1803.*

The act passed in 1803 (3 Stats. at Large, p. 529), prohibiting the importation of slaves into any state which shall itself prohibit their importation, implies, it is said, an admission that the states possessed the power to exclude or

admit them; from which it is inferred that they possess the same power with respect to other articles. If this inference were correct; if this power was exercised, not under any particular clause in the constitution, but in virtue of a general right over the subject of commerce, to exist as long as the constitution itself, it might now be exercised. Any state might now import African slaves into its own territory. But it is obvious that the power of the states over this subject, previous to the year 1808, constitutes an exception to the power of congress to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the pre-existing right of the states to admit or exclude for a limited period. The words are, "the migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the congress prior to the year 1808." The whole object of the exception is to preserve the power to those states which might be disposed to exercise it; and its language seems to the court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the constitution, cannot be admitted to prove the possession of any other similar power.

§ 1194. — *the pilotage act of 1789.*

It has been said that the act of August 7, 1789 (1 Stats. at Large, 54), acknowledges a concurrent power in the states to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with congress to regulate commerce with foreign nations, and amongst the states. But this inference is not, we think, justified by the fact. Although congress cannot enable a state to legislate, congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future presupposes the right in the maker to legislate on the subject. The act unquestionably manifests an intention to leave this subject entirely to the states, until congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by congress. But this section is confined to pilots within the "bays, inlets, rivers, harbors and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; and the adoption of its system by congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the states so to apply it of their own authority. But the adoption of the state system being temporary, being only "until further legislative provision shall be made by congress," shows conclusively an opinion that congress could control the whole subject, and might adopt the system of the states, or provide one of its own.

A state, it is said, or even a private citizen, may construct light-houses. But gentlemen must be aware that, if this proves a power in a state to regulate commerce, it proves that the same power is in the citizen. States or individuals who own lands may, if not forbidden by law, erect on those lands what buildings they please; but this power is entirely distinct from that of regulating

commerce, and may, we presume, be restrained, if exercised so as to produce a public mischief. These acts were cited at the bar for the purpose of showing an opinion in congress that the states possess, concurrently with the legislature of the Union, the power to regulate commerce with foreign nations and among the states. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the states retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to congress.

§ 1195. *The extent of the power to regulate commerce.*

It has been contended, by the counsel for the appellant, that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted. Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. This opinion has been frequently expressed in this court, and is founded as well on the nature of the government as on the words of the constitution. In argument, however, it has been contended that, if a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.

§ 1196. *Whenever a state law and an act of congress conflict the former must give way.*

But the framers of our constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers

not controverted, must yield to it. In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to congress the power to regulate it. In the exercise of this power, congress has passed "An act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels, in its exercise.

§ 1197. *A grant of an exclusive right to navigate the waters of a state is void as against vessels employed in the coasting trade.*

It will at once occur that, when a legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say that a state is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the state of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey, to New York, from enjoying, in her course and on her entrance into port, all the privileges conferred by the act of congress; but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another state. To the court it seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to license vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject. The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels, enrolled as described in that act, and having a license in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the court to contain a positive enactment that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act. The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, "license is hereby granted for the said steamboat Bel-lona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as

effectually, as if they had been inserted in any other part of the act than in the license itself. The word "license" means permission or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license. Would the validity or effect of such an instrument be questioned by the respondent, if executed by persons claiming regularly under the laws of New York? The license must be understood to be what it purports to be, a legislative authority to the steamboat Ballona, "to be employed in carrying on the coasting trade for one year from this date." It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified; but it is equally true, that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it; and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted, that a voyage from New Jersey to New York is one of those operations.

§ 1198. *It is the enrollment of a vessel, not the license, which gives it its American character.*

Notwithstanding the decided language of the license, it has also been maintained that it gives no right to trade; and that its sole purpose is to confer the American character. The answer given to this argument, that the American character is conferred by the enrollment, and not by the license, is, we think, founded too clearly in the words of the law, to require the support of any additional observations. The enrollment of vessels designed for the coasting trade corresponds precisely with the registration of vessels designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burden of twenty tons and upwards; and requires no circumstance essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do, that is, to give permission to a vessel already proved by her enrollment to be American, to carry on the coasting trade.

§ 1199. *The power of congress to regulate navigation as a part of commerce extends to ships carrying passengers as well as cargoes.*

But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers; and this is no part of that commerce which congress may regulate. If, as our whole course of legislation on this subject shows, the power of congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument, to prove that the construction is correct; and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of a cargo;

and no reason is perceived why such vessel should be withdrawn from the regulating power of that government which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen, and respecting ownership, are as applicable to vessels carrying men as to vessels carrying manufactures; and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar rests on the foundation that the power of congress does not extend to navigation as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution, or by reason, for discriminating between the power of congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the constitution, the inference to be drawn from it is rather against the distinction. The section which restrains congress from prohibiting the migration or importation of such persons as any of the states may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals; and so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, and to those who pass involuntarily. If the power reside in congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed, to a greater or less extent, in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The Duty Act, sections 23 and 46 (1 Stats. at Large, 644, 661), contains provisions respecting passengers, and shows that vessels which transport them have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation. In the progress of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business within those provisions which were intended for vessels generally; and on the 2d of March, 1819, passed "An act regulating passenger ships and vessels." 3 Stats. at Large, 488. This wise and humane law provides for the safety and comfort of passengers, and for the communication of everything concerning them which may interest the government to the department of state, but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of congress (if, indeed, any evidence to that point could be required), that the pre-existing regulations comprehended passenger ships among others; and in prescribing the same duties, the legislature must have considered them as possessing the same rights.

§ 1200. — *and the license "to be employed in the coasting trade" authorizes the vessel to carry passengers as well as cargoes.*

If, then, it were even true that the *Bellona* and the *Stoudinger* were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question in the case before the court. The laws of New York which grant the exclusive privilege set up by the respondent take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the United States permit them to enter and deliver in New York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law is the bill of the plaintiff in the state court. The bill does not complain that the *Bellona* and the *Stoudinger* carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers, or otherwise." The answer avers only that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels, not from carrying passengers, but from being moved through the waters of New York by steam, for any purpose whatever.

§ 1201. *The power to regulate vessels is not restricted to those propelled by wind.*

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license. In considering this question, the first idea which presents itself is, that the laws of congress for the regulation of commerce do not look to the principle by which the vessels are moved. That subject is left entirely to individual discretion; and, in that vast and complex system of legislative enactment concerning it, which embraces everything that the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act (2 Stats. at Large, 694) granting a particular privilege to steamboats. With this exception, every act, either prescribing duties or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance. If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steamboats be a matter of such general notoriety that the court may be presumed to know it, although not specially informed



by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history, that, in our western waters, their principal employment is the transportation of merchandise; and all know that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the court to be put completely at rest by the act already mentioned, entitled "An act for the enrolling and licensing of steamboats." This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States. This act demonstrates the opinion of congress that steamboats may be enrolled and licensed in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters and entering ports which are free to such vessels than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either to any vessel having a license under the act of congress, comes, we think, in direct collision with that act. As this decides the cause, it is unnecessary to enter in an examination of that part of the constitution which empowers congress to promote the progress of science and the useful arts.

The court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavor to prove that which is already clear is imputable to a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come depends on a chain of principles which it was necessary to preserve unbroken; and, although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing. Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union are to be contracted by construction into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning founded on these premises, explain away the constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.

*Decree reversed and bill dismissed.*

VEAZIE v. MOOR.

(14 Howard, 568-575. 1852.)

ERROR to the Supreme Judicial Court of Maine.

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—The questions raised upon this record, however subdivided or varied they may have been in form or number, are essentially and

properly restricted to the power and the duty of this court to inquire into the constitutional obligation of the law of the state of Maine, upon which the decision of the supreme court of that state was founded; for if that law and the privileges conferred thereby be coincident with the eighth section of article 1 of the constitution, they can be assailable here upon no just exception. It is insisted, however, that the statute of the state of Maine is in derogation of the power vested in congress by the article and section above mentioned, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." We will examine the character of this objection with reference to the facts disclosed by the record, and with reference also to the provisions of the statute in question, as they have been designed to operate on those facts; and as these last are all agreed by the parties, there can be no need of a comparison of the testimony to ascertain their verity.

The river Penobscot is situated entirely within the state of Maine; having its rise far in the interior of the state, it is not subject to the tides above the city of Bangor, near its mouth. Between the city of Bangor and Old Town, a distance of eight miles, the Penobscot passes over a fall, is crossed by four dams erected for manufacturing purposes, and for the above space is not at this time and never has been navigable; but there is a railroad from Bangor to the steamboat landing at Old Town. On the 30th day of July, 1846, the legislature of Maine by law enacted that "William Moor and Daniel Moor, Jr., their associates and assigns," were authorized to improve the navigation of the Penobscot river above Old Town, and for that purpose were authorized to deepen the channel of the river, to cut down and remove any gravel or ledge, bars, rocks or other obstructions in the bed thereof; to erect in the bed, on the shore or bank of said river, suitable dams and locks, with booms, piers, abutments, breakwaters and other erections to protect the same; to build upon the shore or bank of said river any canal or canals to connect the navigable parts of said river, or (in case it shall be deemed the preferable mode of improvement) any railroads for the like purpose. After providing the modes of acquiring lands or gravel on the shores or in the bed of the river, and for compensating the owners of property used in the prosecution of the contemplated improvement, the act proceeds to limit the time for the completion of the undertaking, within particular *termini* therein named, to the period of seven years from its date; and further requires that, within the period thus limited, the grantees shall build and run a steamboat between those *termini*, and shall, within the same time, make a canal and lock around the falls of the river, or a railroad to connect the route above with that below the falls.

Then follows section 4 of the statute, containing the provision objected to. It is in these words: "If said William Moor and Daniel Moor, Jr., their associates and assigns, shall perform the conditions of this grant as contained in the preceding section, the sole right of navigating said river by boats propelled by steam from said Old Town so far up as they shall render the same navigable, is hereby granted to them for the term of twenty years from and after the completion of the improvement, as provided in the third section of this act." The defendant in error, who is assignee of the original grantees from the legislature, having made certain improvements in the river by the removal of rocks and by deepening the channel in other places, so as to enable boats to run therein with two and a half feet less of water than was requisite for navigation previously to these improvements, and all within the limit prescribed to him by law, built, and on the 27th of May, 1847, placed upon the said river the

steamboat Governor Neptune, and ran her from Old Town over the Piscataquis Falls to a place called Nickaton. In the spring of the year 1847 the defendant in error placed on the river the steamboat Mattanawcook, and ran her to Lincoln till obstructions were removed by him at a place called the Mohawk Rips, above the Piscataquis Falls, and has also built and is now running upon the river another steamboat called the Sam Houston in addition to the Governor Neptune and the Mattanawcook. The plaintiff in error, Samuel Veazie, built the steamboat Governor Dana, and, in conjunction with the other plaintiffs, Levi and Warren R. Young, ran her upon the Penobscot river, between Old Town and the Piscataquis Falls, from the 10th day of May, 1849, until they were arrested by an injunction granted at the suit of the defendant in error. The steamboat Governor Dana was enrolled and licensed for the coasting trade at the custom-house at Bangor. The Penobscot tribe of Indians own all the islands in the Penobscot river above Old Town Falls, some of which they occupy; and this tribe always have been, and now are, under the jurisdiction and guardianship of the state of Maine.

Upon this state of facts agreed, the supreme judicial court of Maine, after argument and advisement, at its June term, 1850, decreed that the plaintiffs in error be perpetually enjoined to desist and refrain from running and employing the steamboat Governor Dana, propelled by steam, from transporting passengers or merchandise on said river, or any part thereof above Old Town, and also from building, using and employing any other boat propelled by steam on that part of the said river for that purpose, without the consent of the said Wyman B. S. Moor, obtained according to law, until the said Moor's exclusive right shall expire. The court further decreed to the defendant in error the sum of \$1,052.45, for damages and expenses incurred by him by reason of the interference with his rights on the part of the plaintiffs in error.

§ 1202. *A grant by statute of the exclusive privilege of navigating with steam a river wholly within the limits of the state is not in violation of any article of the constitution of the United States.*

Upon a comparison of this decree, and of the statute upon which it is founded, with the provision of the constitution already referred to, we are unable to perceive by what rule of interpretation either the statute or the decree can be brought within either of the categories comprised in that provision.

These categories are, 1. Commerce with foreign nations. 2. Commerce amongst the several states. 3. Commerce with the Indian tribes. Taking the term commerce in its broadest acceptation, supposing it to embrace not merely traffic, but the means and vehicles by which it is prosecuted, can it properly be made to include objects and purposes such as those contemplated by the law under review? Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extra-territorial. The phrase can never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community. Nor can it be properly concluded that because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected is legitimately within the import of the phrase foreign commerce, or fairly implied in

any investiture of the power to regulate such commerce. A pretension as far reaching as this would extend to contracts between citizen and citizen of the same state, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals or railroads, from point to point within the several states, towards an ultimate destination, like the one above mentioned. Such a pretension would effectually prevent or paralyze every effort at internal improvement by the several states; for it cannot be supposed that the states would exhaust their capital and their credit in the construction of turnpikes, canals and railroads, the remuneration derivable from which, and all control over which, might be immediately wrested from them, because such public works would be facilities for a commerce which, whilst availing itself of those facilities, was unquestionably internal, although intermediately or ultimately it might become foreign.

The rule here given with respect to the regulation of foreign commerce equally excludes from the regulation of commerce between the states and the Indian tribes the control over turnpikes, canals or railroads, or the clearing and deepening of water-courses exclusively within the states, or the management of the transportation upon and by means of such improvements. In truth, the power vested in congress by article 1, section 8, of the constitution, was not designed to operate upon matters like those embraced in the statute of the state of Maine, and which are essentially local in their nature and extent. The design and object of that power, as evinced in the history of the constitution, was to establish a perfect equality amongst the several states as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies, or local and partial interests, might be disposed to introduce and maintain. These were the views pressed upon the public attention by the advocates for the adoption of the constitution, and in accordance therewith have been the expositions of this instrument propounded by this court in decisions quoted by counsel on either side of this cause, though differently applied by them. *Vide* the *Federalist*, Nos. 7 and 11, and the cases of *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *supra*); *City of New York v. Miln*, 11 Pet., 102 (§§ 1274-83, *infra*); *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*); and the *License Cases*, in 5 How., 504 (§§ 1481-1518, *infra*).

The fact of procuring from the collector of the port of Bangor a license to prosecute the coasting trade for the boat placed upon the Penobscot by the plaintiff in error (the Governor Dana) does not affect, in the slightest degree, the rights or condition of the parties. These remain precisely as they would have stood had no such license been obtained. A license to prosecute the coasting trade is a warrant to traverse the waters washing or bounding the coasts of the United States. Such a license conveys no privilege to use free of tolls, or of any condition whatsoever, the canals constructed by a state, or the water-courses partaking of the character of canals exclusively within the interior of a state, and made practicable for navigation by the funds of the state, or by privileges she may have conferred for the accomplishment of the same end. The attempt to use a coasting license for a purpose like this is, in the first place, a departure from the obvious meaning of the document itself, and an abuse wholly beyond the object and the power of the government in granting it.

Upon the whole, we are of the opinion that the decision of the supreme judicial court of the state of Maine is in accordance with the constitution of the United States, and ought to be, and is hereby, affirmed.

STATE OF PENNSYLVANIA *v.* WHEELING AND BELMONT BRIDGE COMPANY.

(18 Howard, 421-458. 1855.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—The motion in this case is founded upon a bill filed to carry into execution a decree of the court rendered against the defendants at the adjourned term in May, 1852, which decree declared the bridge erected by them across the Ohio river, between Wheeling and Zane's Island, to be an obstruction of the free navigation of the said river, and thereby occasioned a special damage to the plaintiff, for which there was not an adequate remedy at law, and directed that the obstruction be removed, either by elevating the bridge to a height designated, or by abatement.

Since the rendition of this decree, and on the 31st August, 1852, an act of congress has been passed as follows: "That the bridges across the Ohio river at Wheeling, in the state of Virginia, and at Bridgeport, in the state of Ohio, abutting on Zane's Island, in said river, are hereby declared to be lawful structures in their present positions and elevations, and shall be so held and taken to be, anything in the law or laws of the United States to the contrary notwithstanding."

And further: "That the said bridges be declared to be and are established post-roads for the passage of the mails of the United States, and that the Wheeling & Belmont Bridge Company are authorized to have and maintain their bridges at their present site and elevation; and the officers and crews of all vessels and boats navigating said river are required to regulate the use of their said vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of said bridges."

The defendants rely upon this act of congress as furnishing authority for the continuance of the bridge as constructed, and as superseding the effect and operation of the decree of the court previously rendered, declaring it an obstruction to the navigation. On the part of the plaintiff, it is insisted that the act is unconstitutional and void, which raises the principal question in the case. In order to a proper understanding of this question it is material to recur to the ground and principles upon which the majority of the court proceeded in rendering the decree now sought to be enforced.

The bridge had been constructed under an act of the legislature of the state of Virginia; and it was admitted that act conferred full authority upon the defendants for the erection, subject only to the power of congress in the regulation of commerce. It was claimed, however, that congress had acted upon the subject and had regulated the navigation of the Ohio river, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same; and that the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of congress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the river, the act of the legislature of Virginia afforded no authority or justification. It was in conflict with the acts of congress, which were the paramount law. This being the view of the case taken by a majority of the court, they found no difficulty

in arriving at the conclusion that the obstruction of the navigation of the river, by the bridge, was a violation of the right secured to the public by the constitution and laws of congress, nor in applying the appropriate remedy in behalf of the plaintiff. The ground and principles upon which the court proceeded will be found reported in 13 How., 518.

§ 1203. *An act of congress authorizing the continuance of a bridge previously decreed to be abated as an obstruction to navigation is constitutional, and such decree will not be executed except as to costs.*

Since, however, the rendition of this decree, the acts of congress, already referred to, have been passed, by which the bridge is made a post-road for the passage of the mails of the United States, and the defendants are authorized to have and maintain it at its present site and elevation, and requiring all persons navigating the river to regulate such navigation so as not to interfere with it. So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, is not so in the contemplation of law. We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of congress to regulate the navigation of the river. That body having, in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, state and federal, which, if not sufficient, certainly none can be found in our system of government.

§ 1204. *The power of congress to regulate commerce includes the power to legalize a bridge built across a navigable stream.*

We do not enter upon the question whether or not congress possess the power, under the authority in the constitution, "to establish postoffices and post-roads," to legalize this bridge; for, conceding that no such powers can be derived from this clause, it must be admitted that it is, at least, necessarily included in the power conferred to regulate commerce among the several states. The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation; and that power, as we have seen, has been exercised consistent with the continuance of the bridge. But it is urged that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it. The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by acts of congress.

§ 1205. *Rights of private individuals injured by public nuisance.*

But, although this right of navigation be a public right common to all, yet, a private party sustaining special damage by the obstruction may, as has been held in this case, maintain an action at law against the party creating it, to recover his damages; or, to prevent irreparable injury, file a bill in chancery

for the purpose of removing the obstruction. In both cases, the private right to damages, or to the removal, arises out of the unlawful interference with the enjoyment of the public right, which, as we have seen, is under the regulation of congress.

§ 1206. *A decree for the abatement of a nuisance cannot be enforced after it has ceased to be a nuisance in contemplation of law.*

Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respects the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree directing the abatement of the obstruction is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree. Suppose the decree had been executed, and after that the passage of the law in question, can it be doubted but that the defendants would have had a right to reconstruct it? And is it not equally clear that the right to maintain it, if not abated, existed from the moment of the enactment?

§ 1207. *Rights of riparian owners in navigable streams.*

A class of cases that have frequently occurred in the state courts contain principles analogous to those involved in the present case. The purely internal streams of a state which are navigable belong to the riparian owners to the thread of the stream, and, as such, they have a right to use the waters and bed beneath, for their own private emolument, subject only to the public right of navigation. They may construct wharves or dams or canals for the purpose of subjecting the stream to the various uses to which it may be applied, subject to this public easement. But, if these structures materially interfere with the public right, the obstruction may be removed or abated as a public nuisance.

§ 1208. *The public right of navigation in internal streams is exclusively under the control of the state legislature.*

In respect to these purely internal streams of a state, the public right of navigation is exclusively under the control and regulation of the state legislature; and in cases where these erections or obstructions to the navigation are constructed under a law of the state, or sanctioned by legislative authority, they are neither a public nuisance subject to abatement, nor is the individual who may have sustained special damage from their interference with the public use entitled to any remedy for his loss. So far as the public use of the stream is concerned, the legislature having the power to control and regulate it, the statute authorizing the structure, though it may be a real impediment to the navigation, makes it lawful. 5 Wend., 448, 449; 15 id., 113; 17 Term R., 195; 20 id., 90, 101; 5 Cow., 165.

§ 1209. *A compact between two states, assented to by congress, cannot restrict the power of congress to regulate commerce.*

It is also urged that this act of congress is void, for the reason that it is inconsistent with the compact between the states of Virginia and Kentucky, at the time of the admission of the latter into the Union, by which it was agreed "that the use and navigation of the river Ohio, so far as the territory of the proposed, or the territory that shall remain within the limits of this, commonwealth, lies thereon, shall be free and common to the citizens of the United States," and which compact was assented to by congress at the time of the admission of the state: This court held, in the case of *Green v. Biddle*, 8 Wheat., 1 (§§ 191–206, *supra*), that an act of the legislature of Kentucky in contravention of the compact was null and void, within the provision of the constitution forbidding a state to pass any law impairing the obligation of contracts. But that is not the question here. The question here is, whether or not the compact can operate as a restriction upon the power of congress under the constitution to regulate commerce among the several states. Clearly not. Otherwise congress and two states would possess the power to modify and alter the constitution itself.

§ 1210. *The mere fact that the erection or continuance of a bridge under the authority of congress gives one city an advantage over another does not make such authorizing act conflict with the provision in the constitution that no preference shall be given by regulations of commerce to one port over another.*

This is so plain that it is unnecessary to pursue the argument further. But we may refer to the case of *Wilson v. Mason*, 1 Cranch, 88, 92, where it was held that this compact, which stipulated that rights acquired under the commonwealth of Virginia shall be decided according to the then existing laws, could not deprive congress of the power to regulate the appellate jurisdiction of this court, and prevent a review, where none was given in the state law existing at the time of the compact. Again, it is insisted that the act of congress is void, as being inconsistent with the clause in the ninth section of article first of the constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another."

It is urged that the interruption of the navigation of the steamboats engaged in commerce and conveyance of passengers upon the Ohio river at Wheeling from the erection of the bridge, and the delay and expense arising therefrom, virtually operate to give a preference to this port over that of Pittsburgh; that the vessels to and from Pittsburgh navigating the Ohio and Mississippi rivers are not only subjected to this delay and expense in the course of the voyage, but that the obstruction will necessarily have the effect to stop the trade and business at Wheeling, or divert the same in some other direction or channel of commerce. Conceding all this to be true, a majority of the court are of opinion that the act of congress is not inconsistent with the clause of the constitution referred to,—in other words, that is not giving a preference to the ports of one state over those of another, within the true meaning of that provision. There are many acts of congress passed in the exercise of this power to regulate commerce, providing for a special advantage to the port or ports of one state, and which very advantage may incidentally operate to the prejudice of the ports in a neighboring state, which have never been supposed to conflict with this limitation upon its power. The improvement of rivers



and harbors, the erection of light-houses, and other facilities of commerce, may be referred to as examples. It will not do to say that the exercise of an admitted power of congress conferred by the constitution is to be withheld, if it appears, or can be shown, that the effect and operation of the law may incidentally extend beyond the limitation of the power. Upon any such interpretation, the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise. These consequences and incidents are very proper considerations to be urged upon congress for the purpose of dissuading that body from its exercise, but afford no ground for denying the power itself, or the right to exercise it.

The court are also of opinion that, according to the true exposition of this prohibition upon the power of congress, the law in question cannot be regarded as in conflict with it. The propositions originally introduced into the convention, from which this clause in the constitution was derived, declared that congress shall not have power to compel vessels belonging to citizens or foreigners to enter or pay duties or imposts in any other state than that to which they were bound, nor to clear from any other than that in which their cargoes were laden. Nor shall any privilege or immunity be granted to any vessels on entering or clearing out, or paying duties or imposts, in one state in preference to another. Also, that congress shall not have power to fix or establish the particular ports for collecting the duties or imposts in any state, unless the state should neglect to fix them upon notice. I give merely the substance of the several propositions.

Luther Martin, in his letter to the legislature of Maryland, says that these propositions were introduced into the convention by the Maryland delegation; and that without them, he observes, it would have been in the power of congress to compel ships sailing in or out of the Chesapeake to clear or enter at Norfolk, or some port in Virginia—a regulation that would be injurious to the commerce of Maryland. It appears also, from the reports of the convention, that several of the delegates from that state expressed apprehensions that under the power to regulate commerce congress might favor ports of particular states, by requiring vessels destined to other states to enter and clear at the ports of the favored ones, as a vessel bound for Baltimore to enter and clear at Norfolk. These several propositions finally took the form of the clause in question, namely: “No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter or clear or pay duties in another.” 1 Elliott’s Deb., 266, 270, 279, 280, 311, 375; 5 id., 478, 483, 502, 545.

§ 1211. — *the prohibition in question was contemplated only to prevent direct legislation giving preference to one port over another, and not legislation which might incidentally result in such preference.*

The power to establish their ports of entry and clearance by the states was given up and left to congress. But the rights of the states were secured by the exemption of vessels from the necessity of entering or paying duties in the ports of any state other than that to which they were bound, or to obtain a clearance from any port other than at the home port, or that from which they sailed. And, also, by the provision that no preference should be given, by any regulation of commerce or revenue, to the ports of one state over those of another. So far as the regulation of revenue is concerned, the prohibition in the

clause does not seem to have been very important, as in a previous section (8), it was declared that "all duties, imposts and excises shall be uniform throughout the United States;" and, as to a preference by a regulation of commerce, the history of the provision, as well as its language, looks to a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of one state over those of another. That these privileges and immunities, whatever they may be in the judgment of congress, shall be common and equal in all the ports of the several states. Thus much is undoubtedly embraced in the prohibition; and it may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular state over those of another. Indeed, the clause, in terms, seems to import a prohibition against some positive legislation by congress to this effect, and not against any incidental advantages that might possibly result from the legislation of congress upon other subjects connected with commerce, and confessedly within its power.

Besides, it is a mistake to assume that congress is forbidden to give a preference to a port in one state over a port in another. Such preference is given in every instance where it makes a port in one state a port of entry, and refuses to make another port in another state a port of entry. No greater preference, in one sense, can be more directly given than in this way; and yet the power of congress to give such preference has never been questioned. Nor can it be without asserting that the moment congress makes a port in one state a port of entry, it is bound, at the same time, to make all other ports in all other states ports of entry. The truth seems to be, that what is forbidden is, not discrimination between individual ports within the same or different states, but discrimination between states; and if so, in order to bring this case within the prohibition, it is necessary to show, not merely discrimination between Pittsburgh and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania.

Upon the whole, without pursuing the examination further, our conclusion is, that, so far as respects that portion of the decree which directs the alteration or abatement of the bridge, it cannot be carried into execution since the act of congress which regulates the navigation of the Ohio river, consistent with the existence and continuance of the bridge; and that this part of the motion, in behalf of the plaintiff, must be denied. But that, so far as respects that portion of the decree which directs the costs to be paid by the defendants, the motion must be granted.

§ 1212. *Disobedience of an injunction will not be punished where the act enjoined is afterwards adjudged to be authorized by act of congress.*

A motion has also been made, on behalf of the plaintiff, for attachments against the president of the bridge company and others, for disobedience of an injunction issued by Mr. Justice Grier, in vacation, on the 27th June, 1854. It appears that since the rendition of the decree of this court and the passage of the act of congress, and before any proceedings taken to enforce the execution of the decree, notwithstanding this act, the bridge was broken down, in a gale of wind, leaving only some of the cables suspended from the towers across the river. Upon the happening of this event, a bill was filed by the plaintiff, and an application for the injunction above mentioned was made, which was granted, enjoining the defendants, their officers and agents, against a reconstruction of the bridge, unless in conformity with the requirements of the previous decree in the case. The object of the injunction was to suspend the work,

together with the great expenses attending it, until the determination of the question by this court as to the force and effect of the act of congress, in respect to the execution of the decree. The defendants did not appear upon the notice given of the motion for the injunction, and it was, consequently, granted without opposition.

After the writ was served, it was disobeyed, the defendants proceeding in the reconstruction of the bridge, which they had already begun before the issuing or service of the process. A motion is now made for attachments against the persons mentioned for this disobedience and contempt.

A majority of the court are of opinion, inasmuch as we have arrived at the conclusion that the act of congress afforded full authority to the defendants to reconstruct the bridge, and the decree directing its alteration or abatement could not, therefore, be carried into execution after the enactment of this law, and inasmuch as the granting of an attachment for the disobedience is a question resting in the discretion of the court, that, under all the circumstances of the case, the motion should be denied. Some of the judges also entertain doubts as to the regularity of the proceedings in pursuance of which the injunction was issued. MR. JUSTICE WAYNE, MR. JUSTICE GRIER and MR. JUSTICE CURTIS are of opinion that, upon the case presented, the attachment for contempt should issue, and in which opinion I concur. The motion for the attachment is denied, and the injunction dissolved.

JUSTICES McLEAN, GRIER and WAYNE dissented, denying the power of congress to vacate or annul a decree of the supreme court.

#### WISCONSIN v. DULUTH.

(6 Otto, 379-388. 1877.)

##### Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.— This is a bill in chancery, filed in this court by the state of Wisconsin, by virtue of the constitutional provision which confers upon the court jurisdiction of suits between the states and between a state and citizens of other states. To the bill as originally brought, the city of Duluth, as a corporation of the state of Minnesota, and, therefore, a citizen of that state, and the Northern Pacific Railroad Company, a corporation organized under an act of congress, were made defendants. Whether the jurisdiction of the court could have been sustained in regard to the latter corporation, it is not necessary to inquire; for the plaintiff, before the final hearing, dismissed the bill as to the railroad company; and we are now, after answer, replication, and a large amount of evidence, to render our decree as between the state of Wisconsin and the city of Duluth. This city is situated on the northern shore of Lake Superior, near its western extremity; and about seven or eight miles southeast of it, on the Wisconsin shore, is Superior City. A narrow strip of land, varying from three to eight hundred feet in width, projects itself from the shore at Duluth into the waters of the lake about seven miles, terminating just opposite Superior City, and opposite another point coming from the Wisconsin shore. The strip of land first mentioned is a part of the state of Minnesota, and is called Minnesota Point. West of Minnesota Point is a body of water lying parallel to it, and averaging a mile and a half or two miles in width, called Superior Bay, and still west of that a similar body, called St. Louis Bay. Into this latter empties the St. Louis river, draining a large area

of country west of the lake, and discharging the water thus collected into the lake.

St. Louis Bay and Superior Bay are spoken of as parts of St. Louis river, as enlargements of that stream; and testimony is taken to show that the water does not flow from the lake east of Minnesota Point into these bays, and other testimony to show that it does. Whether these bays are considered as parts of Lake Superior, or as mere expansions of the river, is in our view immaterial; for it is a fact not denied that there is a current due to the river through both these bays, which, in the natural condition of the points of land we have mentioned, discharged itself into the main body of the lake at the southern end of Minnesota Point; and that this point was the natural entrance and exit of vessels from the lake into the bays, and from the bays into the lake. And previous to the act of the city of Duluth, presently to be mentioned as the foundation of this suit, it was the only passage for vessels into and out of the bay. There was here in this bay a natural harbor where vessels could anchor in safety, and it was the only one on Lake Superior within fifty or sixty miles of its western limit. Here grew up Superior City, at which all vessels landed which came by the great lake system so far west. Outside of the bay and east of Minnesota Point the lake was rough, and there was no protection for vessels from the winds and waves. The passage or channel at this narrow entrance, which by complainant is called the mouth of the St. Louis river, was never very deep, and the bar, if it may be so called, gave great trouble on this account. For several years prior to 1871, the United States had made appropriations to remedy this difficulty; and a plan had been adopted and money expended in the construction of piers on each side of the channel, which, by confining the flow of the water within narrow limits, would, by the process of scouring, keep the channel from filling up, and it was hoped would also deepen it.

By the spring of 1871, the city of Duluth, stimulated by the construction of the Northern Pacific Railroad westward from that city, which was its terminus on the lake, began to feel the need of a safe harbor of its own. A breakwater or pier built into the lake was started by an appropriation by congress, but was found to be unsatisfactory. The city of Duluth conceived and executed in a very short time the project of a canal across the narrow neck of Minnesota Point, near its connection with the main shore. By this means, vessels could enter Superior Bay, where it washed the shores of Duluth, as well as by the channel which let them into the same bay at Superior City. The railroad company and the city expended large sums of money to dredge out and make this harbor fit for the purposes of the large commerce which was expected to be brought there by the railroad. The canal across Minnesota Point was made about two hundred and fifty feet wide and from fifteen to eighteen feet deep; while the greatest depth at the mouth of the St. Louis river was ten and twelve feet. The citizens of Superior City began to resist this action of the people of Duluth and the railroad company as soon as they comprehended the magnitude of the project. The contest has, from that time to the present, been urged before the state legislatures, before congress, before the war department (as having charge of appropriations to be spent in the improvement of navigation at these points), and in the courts, where there have been several suits before the one we are now about to decide.

The present suit was brought by the state of Wisconsin, on the ground that the channel of the St. Louis river, as it flowed in a state of nature, was the com-

mon boundary between that state and the state of Minnesota, and that she has an interest in the continuance of the channel as an important highway for navigation and commerce in its natural and usual course. That the canal cut by Duluth across Minnesota Point, deeper than the natural outlet of the St. Louis river at its mouth, has diverted, and will continue to divert, the current of that river through Superior Bay into the lake by way of that canal. That the result of this is, that while the current cuts that canal deeper and gives an outlet for the water there at a lower level, it at the same time, by diverting this current from the old outlet, causes it to fill up, and thus destroys the usefulness of the river and bay as an aid of commerce, on which the state had a right to rely. The bill, after reciting the facts which we have already detailed, insists that the city of Duluth cannot, by any right of her own nor by any authority conferred on her by the state of Minnesota, thus divert the waters of the stream — the St. Louis river — from their natural course, to the prejudice of the rights of the state of Wisconsin or of her citizens. It declares that this canal at Duluth does this in violation of law; and it prays of this court to enjoin Duluth from protecting or maintaining it, and by way of mandatory injunction to compel that city to fill up the canal and restore things in that regard to the condition of nature in which they were before the canal was made. The answer, while admitting the construction of the canal, denies almost every other material allegation of the bill. It denies especially that the canal has the effect of changing the course of the current of the river, or does any injury to the southern entrance to Superior Bay or diminishes the flow of water at that point.

A large amount of testimony, professional and non-professional, is presented on that subject. The answer also sets up, as an affirmative defense to the relief sought by the bill, that the United States, by the legislative and executive departments of the government, have approved of the construction of the canal, have taken possession and control of the work, have appropriated and spent money on it, and adopted it as the best mode of making a safe and accessible harbor at the western end of the great system of lake navigation.

Many very interesting questions have been argued, and ably argued, by counsel, which we have not found it necessary to decide. The counsel for defense deny that the state of Wisconsin has any such legal interest in the flow of the waters in their natural course as authorizes her to maintain a suit for their diversion. It is argued that this court can take cognizance of no question which concerns alone the rights of a state in her political or sovereign character. That to sustain the suit she must have some proprietary interest which is affected by the defendant. This question has been raised and discussed in almost every case brought before us by a state, in virtue of the original jurisdiction of the court. We do not find it necessary to make any decision on the point as applicable to the case before us.

Nor shall we address ourselves to the consideration of the mass of conflicting evidence as to the effect of the canal on the flow of the waters of Superior Bay. We will first consider the affirmative defense already mentioned; for, if that be found to be true in point of fact, it will preclude any such action by this court as the plaintiff has prayed for.

It is to be observed, as preliminary to an examination of the acts of the general government, in the special matter before us, that the whole system of river and lake and harbor improvements, whether on the sea-coast or on the lakes or the great navigable rivers of the interior, has for years been mainly

under the control of that government, and that, whenever it has taken charge of the matter, its right to an exclusive control has not been denied. The operations of the government in this regard have been conducted by the bureau of engineering, as part of the war department, to which congress has confided the execution of its wishes in all these matters. That department has mapped out in suitable geographical divisions the work thus imposed upon it, and placed these under the control of officers who are in charge of them. These are again subdivided, so that while the lake system, or, at all events, the western lake system, is in the charge of one general superintendent, the separate works which at different places are conducted under him have each another engineering officer, who has special charge of those works.

For many years past, congress has been in the habit of passing an annual appropriation bill, called the river and harbor bill, devoted to works of this class exclusively; and in these bills it appropriates specific sums to specific works, either already commenced and unfinished, or for new works thereby authorized, or sums necessary for the safety and protection of works already in existence. The money thus appropriated is expended, as we have said, under the direction of the war department. It cannot be necessary to say that when a public work of this character has been inaugurated or adopted by congress, and its management placed under the control of its officers, there exists no right in any other branch of the government to forbid the work, or to prescribe the manner in which it shall be conducted.

With these observations, we proceed to inquire what the general government has done in the matter before us. As we have already stated, it had for several years been at work under appropriations by congress, prior to the construction of the canal at Duluth, in the effort to deepen the channel at the mouth of the St. Louis river, but we may infer, with little success beyond preventing it from filling up. The rapid growth of the city of Duluth, consequent upon its being made the terminus of the railroad, had attracted attention to the necessity of harbor improvements at that point; and congress had made appropriations for a breakwater, which had been partially constructed outside of Minnesota Point in the main water of the lake. But this had proved a failure; and it was seen that no safe harbor for the vast commerce which was expected to be created at that place by the North Pacific Railroad could be secured in that mode. The city of Duluth and the railroad company, impatient of relief from congress, inaugurated, therefore, in 1871, the system of improving the inner harbor in the waters of Superior Bay, and effecting an entrance into that harbor by the canal across Minnesota Point. The canal was completed sufficiently for use in that year, and the dredging of the harbor commenced. The matter was in this condition when congress, by the river and harbor bill approved March 3, 1873, appropriated, "for the purpose of dredging out the Bay of Superior, from the natural entrance to the docks of Superior and Duluth, and preserving both entrances from the lake thereto, \$100,000." The whole sheet of water, as we have said, lying west of Minnesota Point, from one to two miles wide, and extending from Duluth on the north shore to Superior City on the south, was Superior Bay. There was but one entrance into that bay from the lake until the canal was made. There were no docks at Duluth but those made by the railroad company and the city in the inner harbor at the upper end of that bay. We see, then, at once, that congress, recognizing what had been done by private enterprise at Duluth, determined to place that harbor and that canal under the same protection and to

provide for them in the same appropriation which covered the entrance and the harbor at Superior City. Hence, \$100,000 was appropriated as one item, for both entrances and for both improvements, to be administered by the same officers as their judgment might dictate. The following extract from the report of the officer in charge of the matter shows what was done under the appropriation:

1. Completing the pier at the natural entrance to Superior Bay .....	\$25,000
2. Dredging between the piers at the natural entrance .....	11,840
3. Dredging from natural entrance to docks at Superior City .....	12,000
4. Repairing pier at Duluth entrance .....	19,500
5. Dredging between piers at Duluth entrance and from the piers to the docks of Duluth ....	16,400

This dredging was in the inner harbor, and the breakwater was thenceforth abandoned as a government work. An estimate made by the engineer department for the next year's appropriations required for the maintenance of the Superior City entrance, \$10,000; for the Duluth entrance, \$10,000; and for dredging the Bay of Superior, \$100,000; and the appropriation bill, among other items, had, for continuing the improvement of the entrance to the main harbor of Duluth, \$10,000. Of this appropriation, the engineer in charge says that some repairs to the piers (of the canal) were made, and forty-five thousand one hundred and seventy-one and one-half cubic yards were dredged from the inside harbor. By the act entitled "An act making appropriations for the repair, preservation and completion of certain public works in rivers and harbors, and for other purposes, approved March 3, 1875, there was 'appropriated to be expended under the direction of the secretary of war, for the repair, preservation and completion of the public works hereinafter named, viz.: For dredging the inside harbor of Duluth, \$35,000.'"

In the report of the chief of engineers for the year 1875, it is further stated: "The appropriation of \$35,000, made in the river and harbor bill, approved March 3, 1875, restricts the application of that sum to dredging the inside harbor, and during the present fiscal year it is proposed to continue the dredging on the anchorage ground. The north pier of the canal, which was not built by the United States, is in a very precarious state, owing to its being undermined. The estimated cost of the present urgent repairs is \$6,300; and as every year some repairs are necessary, an appropriation of \$10,000 for this purpose is needed."

And in the act of August 1, 1876, there is the following paragraph: "For the improvement of the harbor at Duluth, Minn., \$15,000. Said appropriation is made upon the express condition that it shall be without prejudice to either party in the suit now pending between the state of Wisconsin, plaintiff, and the city of Duluth and the Northern Pacific Railroad, defendants."

§ 1213. *Where congress has adopted a system of harbor improvements and is carrying it into effect, this court cannot forbid the work.*

The hostility of Superior City and of the state of Wisconsin could not avail to defeat the appropriation; but as this suit was then pending, the clause that it should be without prejudice to any one in the suit was inserted. It was not needed. The congress of the United States had themselves, before this, adopted, recognized, and taken charge of this work. It had placed it on precisely the same ground, and provided for it in the same paragraph, and out of the same aggregate sum of money, that it did the work at the original entrance, as it is aptly called, at the mouth of the river. It had abandoned the breakwater as a failure, and as unnecessary, in consequence of this new and

more useful improvement. The war department had accepted the charge of the work, had expended the appropriations made, and had now for several years made the same regular estimates for this work that it did for all others under its control and management. And though the state of Wisconsin had brought her suit in this court to abate the work as a nuisance, and congress was made aware of the fact, it still in 1876 made the usual appropriation, and the war department still had the work in charge, and the congress cautiously said this shall prejudice no one in the suit, but we shall go on notwithstanding, and continue this system of improvement. We do not feel called upon to make an argument to prove that these statutes of the congress of the United States, and these acts of the executive department in carrying those statutes into effect, constitute an adoption of the canal and harbor improvement started by the city of Duluth, and a taking exclusive charge and control of it. That they amount to the declaration of the federal government, that we here interpose and assert our power. We take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands and subject to our control.

§ 1214. *The power in congress to improve navigable rivers and harbors is undoubted.*

If the merest recital of these acts of congress, and of the war department under them, do not establish that proposition, we can have little hope of making it plain by elaborate argument. Nor can there be any doubt that such action is within the constitutional power of congress. It is a power which has been exercised ever since the government was organized under the constitution. The only question ever raised has been how far and under what circumstances the exercise of the power is exclusive of its exercise by the states. And while this court has maintained, in many cases, the right of the states to authorize structures in and over the navigable waters of the states, which may either impede or improve their navigation, in the absence of any action of the general government in the same matter, the doctrine has been laid down with unvarying uniformity, that when congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under state authority. The adjudged cases in this court on this point are numerous. This subject was recently very fully considered in *South Carolina v. Georgia*, 93 U. S., 4 (§§ 1125–31, *supra*), and at this term in *Pound v. Turck*, 95 id., 459 (§§ 1171–73, *supra*). The doctrine was settled, however, long before this. The following cases are fully in point: *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183–1201, *supra*); *Willson v. Blackbird Creek Marsh Co.*, 2 Pet., 245 (§§ 1174–76, *supra*); *The Wheeling Bridge Case*, 18 How., 421 (§§ 1203–12, *supra*); *Gilman v. Philadelphia*, 3 Wall., 713 (§§ 1164–70, *supra*).

If, then, congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this court can have no lawful authority to forbid the work. If that body sees fit to provide a way by which the great commerce of the lakes and the countries west of them, even to Asia, shall be securely accommodated at the harbor of Duluth by this short canal of three or four hundred feet, can this court decree that it must forever pursue the old channel, by the natural outlet, over water too shallow for large vessels, unsafe for small ones, and by a longer and much more tedious route? When congress appropriates \$10,000 to improve, protect and secure this canal, this court can have no power to require it to be filled up and obstructed. While the engineering officers of the government are, under the authority of congress,



doing all they can to make this canal useful to commerce, and keep it in good condition, this court can owe no duty to a state which requires it to order the city of Duluth to destroy it.

These views show conclusively that the state of Wisconsin is not entitled to the relief asked by her bill, and that it must, therefore, be dismissed with costs.

*So ordered.*

§ 1215. **Relative powers of state and federal governments.**—A state, by virtue of its sovereignty, may exercise certain rights over its navigable waters, subject, however, to the paramount power in congress to regulate commerce among the several states. These powers are not concurrent, but are separate and independent of each other. In regard to the exercise of this power by a state, there is no other limit than the boundary of the federal power. *Palmer v. Commissioners of Cuyahoga County*, 8 McL., 227.

§ 1216. Under the clause of the constitution conferring upon congress the power to regulate commerce among the several states, congress has jurisdiction over all navigable streams to the extent that may be necessary for the encouragement and protection of commerce between two or more states. A boat licensed and enrolled in pursuance of an act of congress has the right to the free use of the navigable rivers of the United States, and is entitled to protection against all unlawful obstructions of navigation. For any injury attributable to such obstructions the law will give needful redress without any statutory enactment expressly for that purpose. *Jolly v. Terre Haute Draw-Bridge Co.*, 6 McL., 240.

§ 1217. **Right to use navigable rivers.**—The power of congress to regulate commerce is not incompatible with the enjoyment of local rights. The public, in case of navigable rivers, have a right to use them in passing from state to state; but there exists also the local right of crossing, and the public right of commerce is paramount to all state authority. *Works v. Junction Railroad*, 5 McL., 437.

§ 1218. **Commerce within a state.**—Commerce which is wholly within a state is beyond the control of congress, even though it be carried on between different ports of a state upon the public waters of the United States. A steam freight boat not connected with any transportation company or railroad, plying between ports of the same state lying upon the same river, is not engaged in commerce between the states, and is not subject to the laws of congress relating to the inspection of boilers and hull, even though occasionally carrying goods from port to port which had been brought from points without the state. *United States v. The Steamboat Bright Star*, \* 8 Int. Rev. Rec., 131; *United States v. Steamboat Seneca*, \* 10 Am. L. Reg., 281; *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201); *Haldeman v. Beckwith*, 4 McL., 295; *Steam Propeller Thomas Swan*, 6 Ben., 45.

§ 1219. The navigation between different ports upon a public river within the same state comes within the power of congress to regulate commerce between the several states. *Silliman v. Hudson River Bridge Co.*, 4 Blatch., 74.

§ 1220. Congress has the right, under its power to regulate commerce, to require all steamboats to be licensed and inspected, irrespective of the fact that they are employed wholly upon the waters of a state; and its regulations apply also to ferry boats owned and operated exclusively upon the waters of a state. *United States v. Jackson*, \* 10 N. Y. Leg. Obs., 453.

§ 1221. **Ferries.**—States may regulate ferries, roads, inspections, etc., with respect to navigable rivers lying within their boundaries, so long as such regulations do not come in clear and direct conflict with some legislation of congress, under its power to regulate commerce. *United States v. New Bedford Bridge*, 1 Woodb. & M., 401. See § 1090.

§ 1222. **Dams — Wisconsin river.**—The provision in the constitution of Wisconsin that "the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor," does not forbid the legislature to authorize the construction of a dam in the Wisconsin river, for the improvement and development of the country and the accommodation of the people in the vicinity. *Woodman v. Kilbourn Mfg. Co.*, 1 Biss., 546; 1 Abb., 153; 6 Am. L. Reg. (N. S.), 238. See §§ 1112-14, 1123.

§ 1223. No act of congress having been passed upon the subject of commerce upon the Wisconsin river; no boats or vessels having been licensed nor ports of entry established thereon by federal authority; and there being no act of congress in regard to the navigation of the river as a stream, bearing a necessary relation to commerce among the several states, and the stream being a domestic one, rising, running and emptying into the Mississippi within the limits of the state, the legislature may authorize the construction of a dam in the river for the improvement and development of the country, although its effect is

to partially obstruct the navigability of the river above the dam, for the purposes of rafting logs and lumber. *Ibid.*

§ 1224. It is held that the construction of a dam in the Wisconsin river, which obstructs the floating of rafts and logs thereon, is not prohibited by that provision of the ordinance of 1787 which provides, "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor," since, whatever may have been the force of this ordinance at the time of its passage, its authority and effect ceased and yielded to the paramount authority of the constitution of the United States from the time of its adoption. *Ibid.*

§ 1225. **Power of states to improve rivers.**—The states have a right to authorize improvements on the navigable waters of the United States, in which their citizens are interested, so far as these waters lie within their territorial limits. But such a power cannot be exercised to the injury of an improvement which is being prosecuted under the authority of congress. And the United States may interfere to protect her improvements by a bill in the proper circuit court. *United States v. City of Duluth*, 1 Dill, 469; 10 Am. L. Reg. (N. S.), 449. See §§ 1104, 1105.

§ 1226. **Conspiracies on the high seas.**—The twenty-second section of the act of congress of March 3, 1825, which punishes conspiracies to destroy property on the high seas or on waters within the United States for the purpose of procuring the insurance thereon, is constitutional. The object of the law is the protection of commerce, and this is within the constitutional powers of congress. *United States v. Cole*, 5 McL., 515.

§ 1227. **Theft from vessels.**—The power of congress to enact laws for the punishment of thefts of goods belonging to vessels in distress is derived from that clause of the constitution giving congress power to regulate foreign commerce, and not from that providing for the vesting of admiralty jurisdiction. *United States v. Coombs*, 12 Pet., 76.

§ 1228. **The embargo of December 22, 1807, was constitutional.** *United States v. The Brigantine William*, \* 2 Hall L. J., 256.

§ 1229. **Compact with Alabama.**—The provision in the compact by which Alabama was admitted into the Union, that all navigable waters within the state should forever remain public highways, free to all citizens, etc., is valid under the power given congress to regulate commerce. *Pollard v. Hagan*, 3 How., 230. See §§ 1103, 1122.

§ 1230. **Bridges.**—A law of congress authorizing and regulating the building of bridges across the navigable waters of the United States is valid and constitutional, as being a proper exercise of the power vested in congress under the constitution to regulate commerce with foreign nations and with the different states. *Gray v. Clinton Bridge*, \* 7 Am. L. Reg. (N. S.), 149. See §§ 1112-1114, 1123.

§ 1231. It seems that the power of congress to regulate commerce among the different states is paramount to the power of a state to authorize the building of a bridge across a public river navigable from the sea. *Silliman v. Hudson River Bridge Co.*, 4 Blatch., 83.

§ 1232. The determination of the circumstances under which a bridge may be built over a navigable stream, and the prescribing of general rules for its construction and maintenance, is a regulation of commerce within the meaning of the commercial clause of the constitution, and falls within the powers conferred on congress by that clause. *The Clinton Bridge*, 1 Woolw., 150.

§ 1233. Although under its general power to regulate commerce congress may declare what shall constitute a nuisance or obstruction by general regulation, and provide proceedings for its abatement, yet it seems that neither under this power, nor under the power to establish post-roads, can congress construct a bridge over a navigable river. This belongs to the local or state authority within which the work is to be done, and this authority must be so exercised as not materially to conflict with the paramount authority to regulate commerce. *United States v. Railroad Bridge Co.*, 6 McL., 524; *Silliman v. Hudson River Bridge Co.*, 4 Blatch., 414.

§ 1234. The authority of congress is paramount in the regulation of commerce under the constitution, and its determination in respect to interference with navigation, by obstructions thereto, is conclusive. What it authorizes may be justified upon its authority. What it forbids is necessarily unlawful. It seems, also, that this power is at all times capable of being exercised by congress, and that if, after once authorizing a bridge, it finds that it was mistaken, and that commerce is injuriously affected, it can require the bridge to be altered or removed, and can adapt its regulation of commerce to its view of the public interests. *Miller v. Mayor, etc., of New York*, 13 Blatch., 477.

§ 1235. The power given to congress by the constitution to regulate commerce among the different states is not inconsistent with the sovereignty of the states, nor does it involve any

conflict of jurisdiction between congress and the various states. The state retains all the power over its water-courses which is necessary for local or state purposes. It can make such police regulations as may be necessary for the protection of its citizens. It can adopt such measures in reference to its water-courses as are required by its citizens in facilitating trade and commercial intercourse. It may authorize the erection of works for the improvement of navigation, such as dams and locks. It may authorize the erection of a bridge across a navigable stream within its limits. But in all these cases the power must be exercised subject to the restriction that the right of free navigation is not impaired. If a bridge is erected, it must be sufficiently elevated to admit the safe and convenient passage of such boats or vessels as are most advantageously used for the conveyance of travelers or freight upon the river or water-course spanned by the bridge; or if not thus constructed, there must be a draw of such size and structure as not materially to infringe the right of free and unobstructed navigation. *Jolly v. Terre Haute Draw-Bridge Co.*, 6 McL., 242.

§ 1236. The power in a state to authorize the building of a bridge across a public river navigable from the sea is subordinate to that conferred by the constitution upon congress to regulate commerce. *Silliman v. Hudson River Bridge Co.*, 4 Blatch., 74.

§ 1237. The federal courts cannot punish as a crime the construction of a bridge which obstructs the commerce of a navigable river within the limits of a state, unless congress, under its power to regulate commerce, has made the act an offense against the United States. *United States v. New Bedford Bridge*, 1 Woodb. & M., 401.

§ 1238. — on a river within a state.—The right of free navigation of a river lying within a state is not inconsistent with the right of the state to provide means of crossing the river by bridges or otherwise, when the wants of the public require them, provided such bridges do not injure the navigation of the river. The right to the free navigation of navigable rivers, and the right of the state to adopt those means of crossing which the skill and ingenuity of men have devised, are both equally important, are co-existent, and neither can be permitted to destroy or essentially impair the other. The authority to construct a bridge across a navigable river being in the state, it should be exercised in such a manner that while it gives full effect to the power itself, it should interfere as little as possible with the other right, that of free navigation; and this is the true test whether a particular structure is such an obstruction as is contrary to law. It being within the power of the state to determine when, where and under what circumstances a bridge shall be constructed, it seems to be a general rule that no third party can question the decision of the state in the premises. *Columbus Ins. Co. v. Peoria Bridge Co.*, 6 McL., 72.

§ 1239. — Clinton bridge.—The act of congress of February 27, 1835, entitled "An act declaring Clinton bridge across the Mississippi river, at Clinton, in the state of Iowa, a *post-route*," and which declares the bridge to be a "lawful structure," legalizes the bridge as constructed, with its abutments, piers, superstructure, draw and height. The act is within the power of congress to regulate commerce, and abated a suit pending at the time of its passage, the object of which was to restrain the construction of the bridge as a nuisance. *The Clinton Bridge*, 10 Wall., 454.

§ 1240. — draw-bridge.—A draw-bridge across a navigable river is not an obstruction to navigation. The obstruction would be only momentary, to raise the draw; and as such a work may be very important in a general intercourse of the community, the state has power to make the bridge. It is one of the general powers possessed by the state for the public convenience, and it may be exercised, provided it does not infringe the federal powers; or if it is in the original northwest territory, that it does not violate the provisions of the ordinance of 1787. *Palmer v. Commissioners of Cuyahoga County*, 3 McL., 228. Compare *Columbus Ins. Co. v. Peoria Bridge Co.*, 6 id., 71.

§ 1241. — Wheeling bridge.—The Ohio being a navigable river, and congress having regulated navigation upon it by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for the neglect of those duties; and having expressly sanctioned the compact made by Virginia with Kentucky, at the time of its admission into the Union, "that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory that shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States," the construction by state authority of a bridge over the river at Wheeling, which obstructs the navigation of the river, is in conflict with the power of congress, as thus exercised, to regulate commerce, and in violation of the compact between these two states. (TANEY, C. J., dissented, on the ground that congress had not regulated the construction of bridges over the Ohio, or declared an obstruction therein a nuisance; and DANIEL, J., on the ground that congress had no power to break down such a work of internal improvement.) *State of Pennsylvania v. Wheeling, etc.*, Bridge Co., 13 How., 518.

§ 1242. — *bridge across Niagara river.*—The act of congress of June, 1870, which authorized the building of the international bridge over Niagara river, would have been constitutional had it been the intention of congress thereby to have conferred upon the district court of New York the power to determine the compensation to be charged by the bridge company to the railway companies using it. *Canada Southern R'y Co. v. International Bridge Co.*, 8 Fed. R., 192.

§ 1243. — *In Chicago.*—The following ordinances of the city of Chicago, respecting the Chicago river, are held not to cause such material obstructions to commerce as to warrant their avoidance as regulations of interstate commerce: "Sec. 934. Between the hours of six and seven in the morning, and half past five and half past six in the evening, Sundays excepted, it shall be unlawful to open any bridge within the city of Chicago. Sec. 935. During the hours between seven o'clock in the morning and half past five o'clock in the evening, it shall be unlawful to keep open any bridge within the city of Chicago, for the purpose of permitting vessels or other craft to pass through the same, for a longer period, at any one time, than ten minutes, at the expiration of which period it shall be the duty of the bridge-tender or other person in charge of the bridge to display the proper signal and immediately close the same, and keep it closed for fully ten minutes, for such persons, teams or vehicles as may be waiting to pass over. If so much time shall be required when the said bridge shall again be opened [if necessary for vessels to pass], for a like period, and so on alternately [if necessary], during the hours last aforesaid; and in every instance when any such bridge shall be opened for the passage of any vessel, vessels or other craft, and closed before the expiration of ten minutes from the time of opening, said bridge shall then, in every such case, remain closed for fully ten minutes, if necessary, in order to allow all persons, teams and vehicles in waiting, to pass over said bridge. Sec. 936. Bridge-tenders, or persons in charge of the bridges, shall not close the same against vessels seeking to pass through until passengers, teams or vehicles have been delayed fully ten minutes by the bridges being opened." *Escanaba, etc., Transportation Co. v. City of Chicago*,\* 12 Fed. R., 777.

### 3. *Tax on Transportation of Passengers and Merchandise.*

SUMMARY—*Tax on transportation between states*, § 1244.—*Transportation is commerce*, § 1245.—*Tax on gross receipts of railroad companies*, §§ 1246, 1247.—*License tax on express companies*, 1248.—*Tax on passengers carried out of a state*, §§ 1249, 1250.—*Master of vessel required to report as to passengers*, §§ 1251, 1253; *or to pay to certain officers a certain sum on each passenger*, §§ 1252, 1253; *or to furnish a bond of indemnity*, §§ 1253, 1254.

§ 1244. A state law levying a tax upon all freight taken up without the state and brought within, or taken up within the state and carried out, is in violation of the provision of the constitution vesting in congress the power to regulate commerce among the states. *Case of the State Freight Tax*, §§ 1255-62. See §§ 848, 1026, 1345.

§ 1245. The transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. *Ibid.*

§ 1246. A state law, imposing a tax upon the gross receipts of railroad companies, is not repugnant to the federal constitution as being a regulation of interstate commerce, though part of the receipts are derived from the transportation of goods from state to state. *State Tax on Railway Gross Receipts*, §§ 1263-64.

§ 1247. A railroad company, whose line extended beyond the limits of the state, was required by its charter to pay to the state a part of the money received for the transportation of passengers. *Held*, that this was not an unwarrantable regulation of interstate commerce. *Railroad Co. v. Maryland*, §§ 1265-67.

§ 1248. A city ordinance, imposing a license tax upon express companies doing business within the city, and having a business extending beyond the limits of the state, is not repugnant to the constitutional provision vesting in congress the power to regulate commerce among the states. *Osborne v. Mobile*, § 1268.

§ 1249. A capitation tax levied by a state upon every passenger coming within or going out of the same tends to impede the federal government in the performance of its legitimate functions and to defeat the purposes for which it was organized, and is therefore void. *Crandall v. State of Nevada*, §§ 1269-73. See §§ 1087, 1111, 1119.

§ 1250. It seems that a tax on each passenger carried out of the state by public conveyance is not a regulation of commerce. *Ibid.*

§ 1251. A state law, requiring the master of every vessel arriving from a foreign port to make a report of the name, place of birth, age, etc., of every person brought as a passenger, and imposing a penalty for failure to comply, is a valid police regulation, and not a regulation of commerce. *City of New York v. Miln*, §§ 1274-88.

§ 1252. A law of a state, requiring masters of vessels engaged in foreign or coasting trade to pay to certain state officers a certain sum for each passenger brought into port, and giving the master the right to recover from each person the sum paid on his account, is a regulation of commerce, and void. *Passenger Cases*, §§ 1234-1235.

§ 1253. A law of state, requiring the master of every vessel landing in her ports to report the number of foreign passengers brought by him, and to give a heavy bond to secure the authorities against any loss by reason of being obliged to support them as paupers, etc., or, in lieu thereof, to pay an insignificant sum for each passenger, is a regulation of foreign commerce in regard to a subject-matter purely national in its character, and, therefore, unconstitutional. *Henderson v. Mayor of New York*, §§ 1336-42.

§ 1254. A law of a state giving a state officer power to board all vessels coming into her ports, and to demand a bond of indemnity for every passenger determined by him to be insane, blind, a convicted criminal, a debauched woman, or a pauper, likely to become a public charge, or to belong to any of the classes specified in such law, in order that any municipality in the state may be secured against expense incurred on their account, or, in lieu thereof, to demand the payment of such amount as he may deem proper, is a regulation of commerce with foreign nations, and, therefore, unconstitutional. *Chy Lung v. Freeman*, §§ 1343, 1344.

[NOTES.— See §§ 1345, 1346.]

#### CASE OF THE STATE FREIGHT TAX.

##### READING RAILROAD COMPANY v. PENNSYLVANIA.

(15 Wallace, 232-282. 1872.)

ERROR to the Supreme Court of Pennsylvania.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.— We are called upon, in this case, to review a judgment of the supreme court of Pennsylvania affirming the validity of a statute of the state, which the plaintiffs in error allege to be repugnant to the federal constitution.

The case presents the question whether the statute in question — so far as it imposes a tax upon freight taken up within the state and carried out of it, or taken up outside the state and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the state — is not repugnant to the provision of the constitution of the United States which ordains “that congress shall have power to regulate commerce with foreign nations and among the several states,” or in conflict with the provision that “no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.” The question is a grave one. It calls upon us to trace the line, always difficult to be traced, between the limits of state sovereignty in imposing taxation, and the power and duty of the federal government to protect and regulate interstate commerce. While, upon the one hand, it is of the utmost importance that the states should possess the power to raise revenue for all the purposes of a state government, by any means and in any manner not inconsistent with the powers which the people of the states have conferred upon the general government, it is equally important that the domain of the latter should be preserved free from invasion, and that no state legislation should be sustained which defeats the avowed purposes of the federal constitution, or which assumes to regulate or control subjects committed by that constitution exclusively to the regulation of congress.

§ 1255. *The constitutionality of a state tax is to be determined by the subject upon which the burden is laid.*

Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the constitution of the United States, it is necessary to have a clear apprehension of the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of *Bank of Commerce v. New York City*, 2 Black, 620 (§§ 408–413, *supra*); in *The Bank Tax Case*, 2 Wall., 200 (§§ 414–416, *supra*); *Society for Savings v. Coite*, 6 id., 594, and *Provident Bank v. Massachusetts*, id., 611. In all these cases it appeared that the bank was required by the statute to pay the tax, but the decisions turned upon the question, what was the subject of the tax, upon what did the burden really rest, not upon the question from whom the state exacted payment into its treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was held unconstitutional, but where it rested upon the franchise of the bank it was sustained.

§ 1256. *The law in question imposed the tax upon the freight carried.*

Upon what, then, is the tax imposed by the act of August 25, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the state treasurer for the use of the commonwealth, “on each two thousand pounds of freight so carried,” a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the act provides, “where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the state treasurer may select and notify thereof,” no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines, thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The state treasurer is to decide which of several shall pay the whole. There is still another provision in the act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property or their business. The provision is as follows: “Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith.” Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act

as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority. *Vide* Boyle v. Reading R. Co., 54 Penn. St., 310; Cumberland Valley R. Co.'s Appeal, 62 id., 218. In view of these provisions of the statute, it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported, or upon the consignor or consignee of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the state treasury is, in effect, only a tax-gatherer. The practical operation of the law has been well illustrated by another (Chancellor Bates in *Clarke v. Philadelphia, etc., R. Co.*), when commenting upon a statute of the state of Delaware very similar to the one now under consideration. He said: "The position of the carrier under this law is substantially that of one to whom public taxes are farmed out — who undertakes by contract to advance to the government a required revenue, with power by suit or distress to collect a like amount out of those upon whom the tax is laid. The only imaginable difference is that, in the case of taxes farmed out, the obligation to account to the government is voluntarily assumed by contract, and not imposed by law, as upon the carrier under this act; also, that different means are provided for raising the tax out of those ultimately chargeable with it."

Considering it, then, as manifest that the tax demanded by the act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the state, or from points without the state to points within it, or from points within the state to points without it, the act is a regulation of interstate commerce.

§ 1257. *The transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself.*

Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution, when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states. In his work on the constitution (§ 1057), Judge Story asserts that the sense in which the word commerce is used in that instrument includes not only traffic, but intercourse and navigation. And in the *Passenger Cases*, 7 How., 416 (§§ 1284-1335, *infra*), it was said: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in

buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the states it must have been principally by land when the constitution was adopted.

§ 1258. *A tax upon freight transported from state to state is a regulation of commerce among the states.*

Then, why is not a tax upon freight transported from state to state a regulation of interstate transportation, and, therefore, a regulation of commerce among the states? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the state, and in taking them out? The present case is the best possible illustration. The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the state and carried out, or taken up in other states and brought within her limits, shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state may impose one of \$5. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines. It would hardly be maintained, we think, that had the state established custom-houses on her borders, wherever a railroad or canal comes to the state line, and demanded at these houses a duty for allowing merchandise to enter or to leave the state upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister states. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand. The goods of no citizen of New York, New Jersey, Ohio or of any other state, may be placed upon a canal, railroad or steamboat within the state for transportation any distance, either into or out of the state, without being subjected to the burden. Nor can it make any difference that the legislative purpose was to raise money for the support of the state government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering.

§ 1259. *The fact that the tax is levied upon all freight does not save a law laying a tax on freight carried from one state to another.*

Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade. We are not at this moment inquiring further than whether taxing goods carried because they are carried is a regulation of carriage. The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state. Nor is a rule prescribed for carriage of goods through, out of, or into a state any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a state may regulate its internal commerce as it pleases. If a state chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another



state, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the state.

We may notice here a position taken by the defendants in error, and stoutly defended in the argument, that the tax levied, instead of being a regulation of commerce, is compensation for the use of the works of internal improvement constructed under the authority of the state and by virtue of franchises granted by the state; in other words, that it is a toll for the use of the highways, a part of which, in right of her eminent domain, the state may order to be paid into her treasury. We are asked, if the works were in her own hands, if she were the owner of them, what provision in the federal constitution would forbid her to increase her revenue by an increase of the charge of transportation over them? When in the hands of creatures exercising her franchises, what clause in any instrument forbids her to tax the franchises, and to authorize the tax to be added to existing tolls and franchises?

That this argument rests upon a misconception of the statute is to our minds very evident. We concede the right and power of the state to tax the franchises of its corporations, and the right of the owners of artificial highways, whether such owners be the state or grantees of franchises from the state, to exact what they please for the use of their ways. That right is an attribute of ownership. But this tax is not laid upon the franchises of the corporation, nor upon those who hold a part of the state's eminent domain. It is laid upon those who deal with the owners of the highways or means of conveyance. The state is not herself the owner of the roadways, nor of the motive power. The tax is not compensation for services rendered by her or by her agents. It is something beyond the cost of transportation or the ordinary charges therefor. Having no ownership in the railroads or canals the state has no title to their income, except so far as she reserved it in the charters of the companies. Tolls and freights are a compensation for services rendered, or facilities furnished, to a passenger or transporter. These are not rendered or furnished by the state. A tax is a demand of sovereignty; a toll is a demand of proprietorship. The tax levied by this act is therefore not a toll. It is not exacted in compensation for the use of the roadway; and if it were, the right to make terms for the use of the roadway is in the grantee of the franchises, not in the grantor. But, in truth, the state has no more right to demand a portion of the tolls which the grantees of her franchises may exact than she would have to demand a portion of the rents of land which she had sold. She may tax by virtue of her sovereignty, and measure the tax by income, but the income itself is beyond her reach. All this, however, is abstract and apart from the case before us. That the act of 1864 was not intended to assert a claim for the use of the public works, or a claim for a part of the tolls, is too apparent to escape observation. The tax was imposed upon freight carried by steamboat companies, whether incorporated by the state or not, and whether exercising privileges granted by the state or not. It reaches freight passing up and down the Delaware and the Ohio rivers carried by companies who derive no rights from grants of Pennsylvania, who are exercising no part of her eminent domain; and, as we have noticed heretofore, the tax is not proportioned to services rendered, or to the use made of canals or railways. It is the same, whether the transportation be long or short. It must, therefore, be considered an exaction, in right of alleged sovereignty, from freight transported, or the right of transportation out of, or into, or through the state — a burden upon interstate intercourse.

§ 1260. *A state law imposing a tax upon freight carried between states is a regulation of interstate commerce.*

If, then, this is a tax upon freight carried between states, and a tax because of its transportation, and if such a tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the constitution of the United States. It is not necessary to the present case to go at large into the much-debated question whether the power given to congress by the constitution to regulate commerce among the states is exclusive. In the earlier decisions of this court it was said to have been so entirely vested in congress that no part of it can be exercised by a state. *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *supra*); *Passenger Cases*, 7 How., 283 (§§ 1284-1335, *infra*). It has, indeed, often been argued, and sometimes intimated by the court, that, so far as congress has not legislated on the subject, the states may legislate respecting interstate commerce. Yet, if they can, why may they not add regulations to commerce with foreign nations beyond those made by congress, if not inconsistent with them, for the power over both foreign and interstate commerce is conferred upon the federal legislature by the same words. And certainly it has never yet been decided by this court that the power to regulate interstate, as well as foreign, commerce is not exclusively in congress.

§ 1261. *Wherever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they are within the exclusive legislative power of congress.*

Cases that have sustained state laws alleged to be regulations of commerce among the states have been such as related to bridges or dams across streams wholly within a state, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such, as in *Gilman v. Philadelphia*, 3 Wall., 713 (§§ 1164-70, *supra*), it was said "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." However this may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by congress. *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How., 299 (§§ 1541-47, *infra*); *Gilman v. Philadelphia*, *supra*; *Crandall v. State of Nevada*, 6 Wall., 42 (§§ 1269-73, *infra*). Surely transportation of passengers or merchandise through a state, or from one state to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one state can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between states remote from each other may be destroyed. The produce of western states may thus be effectually excluded from eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the states was conferred upon the federal government.

§ 1262. *Cases examined.*

In *Almy v. State of California*, 24 How., 169 (§ 1465, *infra*), it was held by this court that a law of the state imposing a tax upon bills of lading for gold or silver transported from that state to any port or place without the state was substantially a tax upon the transportation itself, and was therefore uncon-

stitutional. True, the decision was rested on the ground that it was a tax upon exports, and subsequently, in *Woodruff v. Parham*, 8 Wall., 123 (§§ 1471-73, *infra*), the court denied the correctness of the reasons given for the decision; but they said at the same time the case was well decided for another reason, viz., that such a tax was a regulation of commerce — a tax imposed upon the transportation of goods from one state to another over the high seas, in conflict with that freedom of transit of goods and persons between one state and another, which is within the rule laid down in *Crandall v. Nevada*, 6 id., 35, and with the authority of congress to regulate commerce among the states.

In *Crandall v. State of Nevada*, where it appeared that the legislature of the state had enacted that there should "be levied and collected a capitation tax of \$1 upon every person leaving the state by any railroad, stage-coach or other vehicle engaged or employed in the business of transporting passengers for hire," and required the proprietors, owners and corporations so engaged to make monthly reports of the number of persons carried, and to pay the tax, it was ruled that though required to be paid by the carriers, the tax was a tax upon passengers, for the privilege of being carried out of the state, and not a tax on the business of the carriers. For that reason it was held that the law imposing it was invalid, as in conflict with the constitution of the United States. A majority of the court, it is true, declined to rest the decision upon the ground that the tax was a regulation of interstate commerce, and therefore beyond the power of the state to impose, but all the judges agreed that the state law was unconstitutional and void. The chief justice and Mr. Justice Clifford thought the judgment should have been placed exclusively on the ground that the act of the state legislature was inconsistent with the power conferred upon congress to regulate commerce among the several states, and it does not appear that the other judges held that it was not thus inconsistent. In any view of the case, however, it decides that a state cannot tax persons for passing through, or out of it. Interstate transportation of passengers is beyond the reach of a state legislature. And if state taxation of persons passing from one state to another, or a state tax upon interstate transportation of passengers, is unconstitutional, *a fortiori*, if possible, is a state tax upon the carriage of merchandise from state to state, in conflict with the federal constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in congress to regulate commerce among the states, we regard it as established that no state can impose a tax upon freight transported from state to state, or upon the transporter because of such transportation.

But while holding this, we recognize fully the power of each state to tax at its discretion its own internal commerce, and the franchises, property or business of its own corporations, so that interstate intercourse, trade or commerce be not embarrassed or restricted. That must remain free. The conclusion of the whole is that, in our opinion, the act of the legislature of Pennsylvania of August 25, 1864, so far as it applies to articles carried through the state, or articles taken up in the state and carried out of it, or articles taken up without the state and brought into it, is unconstitutional and void.

Judgment reversed, and the record is remitted for further proceedings in accordance with this opinion.

JUSTICES SWAYNE and DAVIS dissented, holding that the tax was imposed upon the business of those required to pay it.

## STATE TAX ON RAILWAY GROSS RECEIPTS.

(15 Wallace, 284-299. 1872.)

ERROR to the Supreme Court of Pennsylvania.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The question is whether the act of the legislature of Pennsylvania passed February 23, 1866, under which a tax was levied upon the Philadelphia & Reading Railroad Company of three-quarters of one per cent. upon the gross receipts of the company, during the six months ending December 31, 1867, is in conflict with the third clause of the eighth section, article first, of the constitution of the United States, which confers upon congress power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" or whether it is in conflict with the second clause of the tenth section of the same article, which prohibits the states, "without the consent of congress, from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws." It was claimed in the state courts that the act is unconstitutional so far as it taxes that portion of the gross receipts of companies which are derived from transportation from the state to another state, or into the state from another, and the supreme court of the state having decided adversely to the claim, the case has been brought here for review.

§ 1263. *A state law, imposing a tax upon the gross receipts of railroad companies, is not unconstitutional.*

We have recently decided in another case between the parties to the present suit, that freight transported from state to state is not subject to state taxation because thus transported. Such a burden we regard as an invasion of the domain of federal power, a regulation of interstate commerce, which congress only can make. If then a tax upon the gross receipts of a railroad, or a canal company, derived in part from the carriage of goods from one state to another, is to be regarded as a tax upon interstate transportation, the question before us is already decided. The answer which must be given to it depends upon the prior question, whether a tax upon gross receipts of a transportation company is a tax upon commerce, so far as that commerce consists in moving goods or passengers across state lines. No doubt every tax upon personal property, or upon occupations, business or franchises, affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution. We think it may safely be asserted that the states have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent. We think also that such taxation may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations, the states are not obliged to impose a fixed sum upon the franchises or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. No mode of effecting this, and no forms of expression which have not a meaning beyond this, can be regarded as violating the constitution. A power to tax to this extent may be essential to the healthy existence of the state governments, and the federal constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their efficient existence. But, on the other hand, the

rightful powers of the national government must be defended against invasion from any quarter; and if it be, as we have seen, that a tax on goods and commodities transported into a state, or out of it, or a tax upon the owner of such goods for the right thus to transport them, is a regulation of interstate commerce, such as is exclusively within the province of congress, it is, as we have shown in the former case, inhibited by the constitution.

Is, then, the tax, imposed by the act of February 23, 1866, a tax upon freight transported into, or out of, the state, or upon the owner of freight, for the right of thus transporting it? Certainly it is not directly. Very manifestly it is a tax upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage-coach, a railroad car, or a canal, or steamboat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation or upon commerce, and it has never been seriously doubted that such a tax may be laid. A tax upon landlords, as such, affects rents, and generally increases them, but it would be a misnomer to call it a tax upon tenants. A tax upon the occupation of a physician or an attorney, measured by the income of his profession, or upon a banker, graduated according to the amount of his discounts or deposits, will hardly be claimed to be a tax on his patients, clients or customers, though the burden ultimately falls upon them. It is not their money which is taken by the government. The law exacts nothing from them. But when, as in the other case between these parties, a company is made an instrument by the laws to collect the tax from transporters, when the statute plainly contemplates that the contribution is to come from them, it may properly be said they are the persons charged. Such is not this case. The tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company; mingled with its other property, and possibly expended in improvements or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury. The tax is not levied, and, indeed such a tax cannot be, until the expiration of each half-year, and until the money received for freights, and from other sources of income, has actually come into the company's hands. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a state to tax the fruits of such transportation after they have become intermingled with the general property of the carrier, than there is for denying her power to tax goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of personal property in the country. That such a tax is not unwarranted is plain. Thus, in *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*), where it was ruled that a state tax cannot be levied, by the requisition of a license, upon importers of foreign goods by the bale or package, or upon other persons selling the same by bale or package, Chief Justice Marshall, considering the dividing line between the prohibition upon the states against taxing imports and their general power to tax persons and property within their limits, said that "when the importer has so acted upon the thing imported that it has become

incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state." This distinction in the liabilities of property in its different stages has ever since been recognized. *Waring v. The Mayor*, 8 Wall., 122 (§§ 1474-77, *infra*); *Pervear v. The Commonwealth*, 5 id., 479. It is most important to the states that it should be. And yet if the states may tax at pleasure imported goods, so soon as the importer has broken the original packages, and made the first sale, it is obvious the tax will obstruct importation quite as much as would an equal impost upon the unbroken packages before they have gone into the markets. And this is so, though no discrimination be made.

There certainly is a line which separates that power of the federal government to regulate commerce among the states, which is exclusive from the authority of the states to tax persons' property, business or occupations within their limits. This line is sometimes difficult to define with distinctness. It is so in the present case; but we think it may safely be laid down, that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between states, have become subject to legitimate taxation. It is not denied that net earnings of such corporations are taxable by state authority without any inquiry after their sources, and it is difficult to state any well-founded distinction between the lawfulness of a tax upon them and that of a tax upon gross receipts, or between the effects they work upon commerce, except perhaps in degree. They may both come from charges made for transporting freight or passengers between the states, or out of exactions from the freight itself. Net earnings are a part of the gross receipts.

§ 1264. *Power of the states to tax the franchises of railroad companies.*

There is another view of this case to which brief reference may be made. It is not to be questioned that the states may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same.

Influenced by these considerations, we hold that the act of the legislature of the state imposing a tax upon the plaintiffs in error equal to three-quarters of one per cent. of their gross receipts is not invalid because in conflict with the power of congress to regulate commerce among the states. And under the decision made in *Woodruff v. Parham*, 8 Wall., 123 (§§ 1471-73, *infra*), it is not invalid because it lays an impost or duty on imports or exports.

*Judgment affirmed.*

JUSTICES MILLER, FIELD and HUNT dissented, holding that by no device or evasion, by no form of statutory words, can a state compel citizens of other states to pay to it a tax, contribution or toll, for the privilege of having their goods transported through that state by the ordinary channels of commerce.

## RAILROAD COMPANY v. MARYLAND.

(21 Wallace, 456-475. 1874.)

ERROR to the Court of Appeals of Maryland.

§ 1265. *Where the state court passes upon an exemption claimed under the federal constitution, the supreme court has jurisdiction.*

Opinion by MR. JUSTICE BRADLEY.

The first question raised has reference to jurisdiction. It appears by the record that the question of the constitutionality of the stipulation, under the statute of Maryland, was distinctly raised by the defendant, with a denial of any estoppel precluding such a defense. The counsel for the plaintiff contend, and the court of appeals of Maryland held, that whether the stipulation by the state for one-fifth of the passage money was constitutional or not, it was received by the company for the state, and was the money of the state, the company being merely the agent of the state to collect it; and that the company was, therefore, bound to respond to the state for it, on the ground that an agent or receiver cannot withhold the money of his principal under pretense of illegality in the transaction by virtue of which it was obtained. The general doctrine referred to is a sound one, and if it were applicable to this case it would follow that the constitutional question was not necessarily involved; but as this question was in fact passed upon by the court of appeals, and ruled against the defendants, though not the principal ground on which it placed its judgment, it would be our duty, under our recent rulings on the construction of the act of 1867, to assume jurisdiction of the case, and review the judgment of the state court on the constitutional point. But with great respect for the opinion of that learned court, we are compelled to differ with it as to the applicability to the present case of the doctrine referred to. We cannot concur in the position that any part of the passenger money, when received by the company, became or was the money of the state. It was the money of the railroad company alone. The railroad company was authorized by its charter to charge the passenger for transporting him between Baltimore and Washington what it did charge him. The state cannot be permitted to deny that it had power to confer upon the company such a franchise; nor can it be permitted to say that the passenger could complain of any extortion practiced upon him; for the fare, so far as he was concerned, was perfectly legitimate. It might have been greater than it was, and yet he would have had no right to complain. The state, at least, is estopped from saying that he could justly do so. The company, then, charged a lawful fare. The money all went into its treasury together, and one portion was not distinguished from another. The company was simply under a contract to pay to the state one-fifth of the whole amount received for the transportation of passengers. If there was anything unconstitutional in the arrangement it was this contract. The grant of the right to build the road and operate it was constitutional; the right to charge fare and freight was constitutional; the amount of such fare and freight would have been entirely in the discretion of the company if it had not been limited by the grant. There is, in short, nothing in the whole transaction between the state and the company to which, in a constitutional point of view, the slightest exception can be taken, except this contract to pay to the state a portion of the amount received. In the cases in which it has been held that parties engaged in an illegal undertaking are answerable to one another for moneys received therein, it was the undertaking, and not the agreement to pay

over the moneys received, which was obnoxious to the law or its policy. In this case it is not the transaction out of which the money grew, but the agreement to pay over a portion of it, which is vicious, if anything is vicious; and the transaction is only vicious, if at all, because of the reflected effect of the agreement upon it. We think no case can be found where the agreement itself, to divide a common fund or to pay over money received, as contradistinguished from the transaction out of which the money arose, was illegal, in which it has been held that a recovery could be had. If it be said that the vice, if any, lies back of the agreement, namely, in the reservation by the state of one-fifth, it would amount to the same thing. The right to recover would then stand on the reservation, and would be no better than before. We think, therefore, that the constitutionality of the stipulation came directly in question, and could not properly be avoided in determining the case.

STATEMENT OF FACTS.—In approaching the merits of the case it is unnecessary to examine in detail the various laws which constitute the charter of the railroad company in reference to the construction of the Washington branch. They were all accepted by the company, and no question of impairing the obligation of contracts is raised. The substance is simply this: That the state granted to the railroad company the franchise of constructing a railroad from Baltimore to Washington, and of employing machinery and vehicles thereon for the transportation of passengers and merchandise, and of charging therefor certain rates of fare for the one, and freight for the other, the passenger fare not to exceed \$2.50 per passenger for the entire distance, and in that proportion for less distances; and it was stipulated that the company should, at the end of every six months, pay to the state one-fifth of the whole amount which might be received for the transportation of passengers. The question is, whether such a stipulation is, or is not, a violation of the constitution of the United States, as being a restriction of free intercourse and traffic between the different states.

§ 1266. *A railroad company, whose road extends beyond the limits of the state, may be required to pay to the state a part of the money received for transportation.*

That the road is one of the principal thoroughfares in the country for interstate travel is conceded, and, indeed, may be judicially assumed. As, however, nearly all the railroads in the country are, or may be, used to a greater or less extent as links in through transportation, this road cannot in principle be regarded as an exceptional one in that respect.

Commerce on land between the different states is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the constitution was adopted, was entirely per-



formed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair and management, to state regulation and control. They were all made either by the states or under their authority. The power of the state to impose or authorize such tolls as it saw fit was unquestioned. No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to national regulation. The movement of persons and merchandise, so long as it was as free to one person as to another, to the citizens of other states as to the citizens of the state in which it was performed, was not regarded as unconstitutionally restricted and trammelled by tolls exacted on bridges or turnpikes, whether belonging to the state or to private persons. And when, in process of time, canals were constructed, no amount of tolls which was exacted thereon by the state or the companies that owned them, was ever regarded as an infringement of the constitution. When constructed by the state itself, they might be the source of revenues largely exceeding the outlay without exciting even the question of constitutionality. So when, by the improvements and discoveries of mechanical science, railroads came to be built and furnished with all the apparatus of rapid and all-absorbing transportation, no one imagined that the state, if itself owner of the work, might not exact any amount whatever of toll or fare or freight, or authorize its citizens or corporations, if owners, to do the same. Had the state built the road in question it might, to this day, unchallenged and unchallengeable, have charged \$2.50 for carrying a passenger between Baltimore and Washington. So might the railroad company, under authority from the state, if it saw fit to do so. These are positions which must be conceded. No one has ever doubted them.

This unlimited right of the state to charge, or to authorize others to charge, toll, freight or fare for transportation on its roads, canals and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is a legislative — a sovereign — discretion, and in its very nature is unrestricted and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility to the public of those who, for the time being, are officially invested with it. In this respect it is like all other legislative power when not controlled by specific constitutional provisions, and the courts cannot presume that it will be exercised detrimentally.

So long, therefore, as it is conceded (as it seems to us it must be) that the power to charge for transportation, and the amount of the charge, are absolutely within the control of the state, how can it matter what is done with the money, whether it goes to the state or to the stockholders of a private corporation? As before said, the state could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ, in a constitutional point of view, when it authorizes its private citizens to build the road and reserves for its own use a portion of the earnings? We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the state, as a consideration of the franchise, had stipulated that it should have all the passenger money, and that the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed

to those terms, it would have been the same thing. It is simply the exercise by the state of absolute control over its own property and prerogatives.

The exercise of power on the part of a state is very different from the imposition of a tax or duty upon the movements or operations of commerce between the states. Such an imposition, whether relating to persons or goods, we have decided the states cannot make, because it would be a regulation of commerce between the states in a matter in which uniformity is essential to the rights of all, and, therefore, requiring the exclusive legislation of congress. *Crandall v. State of Nevada*, 6 Wall., 42 (§§ 1269-73, *infra*); *Case of State Freight Tax*, 15 id., 232 (§§ 1255-62, *supra*). It is a tax because of the transportation, and is, therefore, virtually a tax on the transportation, and not in any sense a compensation therefor, or for the franchises enjoyed by the corporation that performs it. It is often difficult to draw the line between the power of the state and the prohibitions of the constitution. Whilst it is commonly said that the state has absolute control over the corporations of its own creation, and may impose upon them such conditions as it pleases, and like control over its own territory, highways and bridges, and may impose such exactions for their use as it sees fit, on the other hand, it is conceded that it cannot regulate or impede interstate commerce, nor discriminate between its own citizens and those of other states prejudicially to the latter. The problem is to reconcile the two propositions; and as the latter arises from the provisions of the constitution of the United States, and is therefore paramount, the question is practically reduced to this: What amounts to a regulation of commerce between the states, or to a discrimination against the citizens of other states? This is often difficult to determine. In view, however, of the very plenary powers which a state has always been conceded to have over its own territory, its highways, its franchises and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts. It is not within the category of such acts. It may incidentally affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The state is conceded to possess the power to tax its corporations; and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the state has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro*, and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more nor less than a bonus; and so long as the rates of transportation are entirely discretionary with the states, such a stipulation is clearly within their reserved powers.

§ 1267. *Quære: Whether congress may regulate the fares of railroads running between the states?*

Of course, the question will be asked, and pertinently asked, Has the public no remedy against exorbitant fares and freights exacted by state lines of transportation? We cannot entirely shut our eyes to the argument *ab inconvenienti*. But it may also be asked, Has the public any remedy against exorbitant fares and freights exacted by steamship lines at sea? Maritime transportation is almost as exclusively monopolized by them as land transportation is by the railroads. In their case the only relief found is in the existence or fear of competition. The same kind of relief should avail in reference to land transportation.

Whether, in addition to this, congress, under the power to establish post-roads, to regulate commerce with foreign nations and among the several states, and to provide for the common defense and general welfare, has authority to establish and facilitate the means of communication between the different parts of the country, and thus to counteract the apprehended impediments referred to, is a question which has exercised the profoundest minds of the country. This power was formerly exercised in the construction of the Cumberland road and other similar works. It has more recently been exercised, though mostly on national territory, in the establishment of railroad communication with the Pacific coast. But it is to be hoped that no occasion will ever arise to call for any general exercise of such a power, if it exists. It can hardly be supposed that individual states, as far as they have reserved, or still possess, the power to interfere, will be so regardless of their own interest as to allow an obstructive policy to prevail. If, however, state institutions should so combine or become so consolidated and powerful as, under cover of irrevocable franchises already granted, to acquire absolute control over the transportation of the country, and should exercise it injuriously to the public interest, every constitutional power of congress would undoubtedly be invoked for relief. Some of the states are so situated as to put it in their power, or that of their transportation lines, to interpose formidable obstacles to the free movement of the commerce of the country. Should any such system of exactions be established in these states as materially to impede the passage of produce, merchandise or travel from one part of the country to another, it is hardly to be supposed that the case is a *casus omisus* in the constitution. Commercially, this is but one country, and intercourse between all its parts should be as free as due compensation to the carrier interest will allow. This is demanded by the "general welfare," and is dictated by the spirit of the constitution at least. Any local interference with it will demand from the national legislature the exercise of all the just powers with which it is clothed.

But whether the power to afford relief from onerous exactions for transportation does or does not exist in the general government, we are bound to sustain the constitutional powers and prerogatives of the states, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences. And, in the case before us, we are of opinion that these powers have not been transcended.

*Judgment affirmed.*

MR. JUSTICE MILLER dissented.

#### OSBORNE v. MOBILE.

(16 Wallace, 479-483. 1872.)

ERROR to the Supreme Court of Alabama.

STATEMENT OF FACTS.—Osborne, the agent of an express company incorporated by the state of Georgia, was fined for violation of an ordinance of Mobile, Alabama. The ordinance required express companies doing business within the city, and having a business extending beyond the limits of the state, to pay an annual license of \$500. Companies doing business within the state were required to pay a license of \$100. The question was whether the ordinance was repugnant to the commerce clause of the constitution.

§ 1268. *A license tax on express companies having a business extending beyond the limits of the state is not repugnant to the commerce clause of the constitution.*

Opinion by CHASE, C. J.

In several cases decided at this term we have had occasion to consider questions of state taxation as affected by this clause of the constitution. In one, *Case of State Freight Tax*, 15 Wall., 232 (§§ 1255-62, *supra*), we held that the state could not constitutionally impose and collect a tax upon the tonnage of freight taken up within its limits and carried beyond them, or taken up beyond its limits and brought within them; that is to say, in other words, upon interstate transportation. In another, *Case of State Tax on Railway Gross Receipts*, *id.*, 284 (§§ 1263-64, *supra*), we held that a tax upon the gross receipts for transportation by railroad and canal companies, chartered by the state, is not obnoxious to the objection of repugnancy to the constitutional provision. The tax on tonnage was held to be unconstitutional because it was in effect a restriction upon interstate commerce, which by the constitution was designed to be entirely free. The tax on gross receipts was held not to be repugnant to the constitution, because imposed on the railroad companies in the nature of a general income tax, and incapable of being transferred as a burden upon the property carried from one state to another.

The difficulty of drawing the line between constitutional and unconstitutional taxation by the state was acknowledged, and has always been acknowledged, by this court; but that there is such a line is clear, and the court can best discharge its duty by determining in each case on which side the tax complained of is. It is as important to leave the rightful powers of the state in respect to taxation unimpaired as to maintain the powers of the federal government in their integrity. In the second of the cases recently decided, the whole court agreed that a tax on business carried on within the state, and without discrimination between its citizens and the citizens of other states, might be constitutionally imposed and collected.

The case now before us seems to come within this principle. The Southern Express Company was a Georgia corporation carrying on business in Mobile. There was no discrimination in the taxation of Alabama between it and the corporations and citizens of that state. The tax for license was the same by whomsoever the business was transacted. There is nothing in the case, therefore, which brings it within the case of *Ward v. Maryland*, 12 Wall., 423 (§§ 825-828, *supra*). It seems rather to be governed by the principles settled in *Woodruff v. Parham*, 8 *id.*, 123 (§§ 1471-73, *infra*). Indeed, no objection to the license tax was taken at the bar upon the ground of discrimination. Its validity was assailed for the reason that it imposed a burden upon interstate commerce, and was, therefore, repugnant to the clause of the constitution which confers upon congress the power to regulate commerce among the several states.

It is to be observed that congress has never undertaken to exercise this power in any manner inconsistent with the municipal ordinance under consideration, and there are several cases in which the court has asserted the right of the state to legislate, in the absence of legislation by congress, upon subjects over which the constitution has clothed that body with legislative authority. *License Cases*, 5 How., 504 (§§ 1481-1518, *infra*); *Willson v. Blackbird Creek Marsh Co.*, 2 Pet., 245 (§§ 1174-76, *supra*); *Cooley v. Board of Wardens*, 12 How., 315 (§§ 1541-47, *infra*). But it is not necessary to resort to the principles

maintained in these cases for the decision of the case now before us. It comes directly within the rules laid down in the case relating to the tax upon the gross receipts of railroads. In that case we said: "It is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution." We admitted that "the ultimate effect" of the tax on the gross receipts might "be to increase the cost of transportation," but we held that the right to tax gross receipts, though derived in part from interstate transportation, was within the general "authority of the states to tax persons, property, business or occupations within their limits."

The license tax in the present case was upon a business carried on within the city of Mobile. The business, licensed included transportation beyond the limits of the state, or rather the making of contracts, within the state, for such transportation beyond it. It was with reference to this feature of the business that the tax was, in part, imposed; but it was no more a tax upon interstate commerce than a general tax on drayage would be because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the state.

We think it would be going too far so to narrow the limits of state taxation. The judgment of the supreme court of Alabama is therefore affirmed

## CRANDALL v. STATE OF NEVADA.

(6 Wallace, 85-49. 1867.)

ERROR to the Supreme Court of Nevada.

STATEMENT OF FACTS.—The Nevada statute in question provided for the payment by public carriers of a capitation tax of \$1 for every passenger leaving the state by such carriers.

Opinion by MR. JUSTICE MILLER.

The question for the first time presented to the court by this record is one of importance. The proposition to be considered is the right of a state to levy a tax upon persons residing in the state who may wish to get out of it, and upon persons not residing in it who may have occasion to pass through it. It is to be regretted that such a question should be submitted to our consideration with neither brief nor argument on the part of plaintiff in error. But our regret is diminished by the reflection that the principles which must govern its determination have been the subject of much consideration in cases heretofore decided by this court.

§ 1269. *A capitation tax to be levied upon all passengers leaving the state, and to be paid by the public carriers, is a tax upon such passengers.*

It is claimed by counsel for the state that the tax thus levied is not a tax upon the passenger, but upon the business of the carrier who transports him. If the act were much more skilfully drawn to sustain this hypothesis than it is, we should be very reluctant to admit that any form of words, which had the effect to compel every person traveling through the country by the common and usual modes of public conveyance to pay a specific sum to the state, was not a tax upon the right thus exercised. The statute before us is not, however, embarrassed by any nice difficulties of this character. The language which we have just quoted is, that there shall be levied and collected a capitation tax upon every person leaving the state by any railroad or stage-coach; and the

remaining provisions of the act, which refer to this tax, only provide a mode of collecting it. The officers and agents of the railroad companies, and the proprietors of the stage-coaches, are made responsible for this, and so become the collectors of the tax.

We shall have occasion to refer hereafter somewhat in detail to the opinions of the judges of this court in *The Passenger Cases*, 7 How., 283 (§§ 1284-1335, *infra*), in which there were wide differences on several points involved in the case before us. In the case from New York then under consideration, the statute provided that the health commissioner should be entitled to demand and receive from the master of every vessel that should arrive in the port of New York, from a foreign port, \$1.50 for every cabin passenger, and \$1 for each steerage passenger, and from each coasting vessel, twenty-five cents for every person on board. That statute does not use language so strong as the Nevada statute, indicative of a personal tax on the passenger, but merely taxes the master of the vessel according to the number of his passengers; but the court held it to be a tax upon the passenger, and that the master was the agent of the state for its collection. Chief Justice Taney, while he differed from the majority of the court, and held the law to be valid, said of the tax levied by the analogous statute of Massachusetts, that "its payment is the condition upon which the state permits the alien passenger to come on shore and mingle with its citizens, and to reside among them. It is demanded of the captain, and not from every separate passenger, for convenience of collection. But the burden evidently falls upon the passenger, and he, in fact, pays it, either in the enhanced price of his passage, or directly to the captain before he is allowed to embark for the voyage. The nature of the transaction, and the ordinary course of business, show that this must be so."

§ 1270. *Whether a tax on passengers going out of the state is a tax on exports.*

Having determined that the statute of Nevada imposes a tax upon the passenger for the privilege of leaving the state, or passing through it by the ordinary mode of passenger travel, we proceed to inquire if it is for that reason in conflict with the constitution of the United States. In the argument of the counsel for the defendant in error, and in the opinion of the supreme court of Nevada, which is found in the record, it is assumed that this question must be decided by an exclusive reference to two provisions of the constitution, namely, that which forbids any state, without the consent of congress, to lay any imposts or duties on imports or exports, and that which confers on congress the power to regulate commerce with foreign nations and among the several states.

The question as thus narrowed is not free from difficulties. Can a citizen of the United States traveling from one part of the Union to another be called an export? It was insisted in *The Passenger Cases*, to which we have already referred, that foreigners coming to this country were imports within the meaning of the constitution, and the provision of that instrument, that the migration or importation of such persons as any of the states then existing should think proper to admit should not be prohibited prior to the year 1808, but that a tax might be imposed on such importation, was relied on as showing that the word import applied to persons as well as to merchandise. It was answered that this latter clause had exclusive reference to slaves, who were property as well as persons, and therefore proved nothing. While some of the judges who concurred in holding those laws to be unconstitutional gave as one of their rea-

sons that they were taxes on imports, it is evident that this view did not receive the assent of a majority of the court. The application of this provision of the constitution to the proposition which we have stated in regard to the citizen is still less satisfactory than it would be to the case of foreigners migrating to the United States. But it is unnecessary to consider this point further in the view which we have taken of the case.

§ 1271. — *it seems that such a tax is not a regulation of commerce.*

As regards the commerce clause of the constitution, two propositions are advanced on behalf of the defendant in error. 1. That the tax imposed by the state on passengers is not a regulation of commerce. 2. That if it can be so considered, it is one of those powers which the states can exercise, until congress has so legislated as to indicate its intention to exclude state legislation on the same subject.

The proposition that the power to regulate commerce, as granted to congress by the constitution, necessarily excludes the exercise by the states of any of the power thus granted, is one which has been much considered in this court, and the earlier discussions left the question in much doubt. As late as the January term, 1849, the opinions of the judges in *The Passenger Cases* show that the question was considered to be one of much importance in those cases, and was even then unsettled, though previous decisions of the court were relied on by the judges themselves as deciding it in different ways. It was certainly, so far as those cases affected it, left an open question.

In the case of *Cooley v. Board of Wardens*, 12 How., 299 (§§ 1541-47, *infra*), four years later, the same question came directly before the court in reference to the local laws of the port of Philadelphia concerning pilots. It was claimed that they constituted a regulation of commerce, and were therefore void. The court held that they did come within the meaning of the term "to regulate commerce," but that until congress made regulations concerning pilots the states were competent to do so. Perhaps no more satisfactory solution has ever been given of this vexed question than the one furnished by the court in that case. After showing that there are some powers granted to congress which are exclusive of similar powers in the states, because they are declared to be so, and that other powers are necessarily so from their very nature, the court proceeds to say, that the authority to regulate commerce with foreign nations and among the states includes within its compass powers which can only be exercised by congress, as well as powers which, from their nature, can best be exercised by the state legislatures; to which latter class the regulation of pilots belongs. "Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress." In the case of *Gilman v. Philadelphia*, 3 Wall., 713 (§§ 1164-70, *supra*), this doctrine is reaffirmed, and under it a bridge across a stream navigable from the ocean, authorized by state law, was held to be well authorized in the absence of any legislation by congress affecting the matter. It may be that under the power to regulate commerce among the states, congress has authority to pass laws, the operation of which would be inconsistent with the tax imposed by the state of Nevada, but we know of no such statute now in existence. Inasmuch, therefore, as the tax does not itself institute any regulation of commerce of a national character, or which has a uniform operation over the whole country, it is not easy to maintain, in view of the principles on which those cases were decided, that it violates the clause of the federal constitution which we have had under review.

§ 1272. *No power can exist in a state the exercise of which might tend to defeat the purposes for which the federal government was established; hence a law levying a tax on passengers going out of the state is void.*

But we do not concede that the question before us is to be determined by the two clauses of the constitution which we have been examining. The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. Here sits its legislature, composed of senators and representatives, from the states and from the people of the states. Here resides the president, directing, through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the nation, to which all its citizens have a right to resort to claim justice at its hands. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the federal government. That government has a right to call to this point any or all of its citizens to aid in its service, as members of the congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a state over whose territory they must pass to reach the point where these services must be rendered. The government, also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a state to obstruct this right that would not enable it to defeat the purposes for which the government was established.

The federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any state of the Union. If this right is dependent in any sense, however limited, upon the pleasure of a state, the government itself may be overthrown by an obstruction to its exercise. Much the largest part of the transportation of troops during the late rebellion was by railroads, and largely through states whose people were hostile to the Union. If the tax levied by Nevada on railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory. But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several states, and this right is in its nature independent of the will of any state over whose soil he must pass in the exercise of it.

The views here advanced are neither novel nor unsupported by authority. The question of the taxing power of the states, as its exercise has affected the functions of the federal government, has been repeatedly considered by this court, and the right of the states in this mode to impede or embarrass the con-



stitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied. The leading case of this class is that of *McCulloch v. State of Maryland*, 4 Wheat., 316 (§§ 380-398, *supra*). The case is one every way important, and is familiar to the statesman and the constitutional lawyer. The congress, for the purpose of aiding the fiscal operations of the government, had chartered the Bank of the United States, with authority to establish branches in the different states, and to issue notes for circulation. The legislature of Maryland had levied a tax upon these circulating notes, which the bank refused to pay, on the ground that the statute was void by reason of its antagonism to the federal constitution. No particular provision of the constitution was pointed to as prohibiting the taxation by the state. Indeed, the authority of congress to create the bank, which was strenuously denied, and the discussion of which constituted an important element in the opinion of the court, was not based by that opinion on any express grant of power, but was claimed to be necessary and proper to enable the government to carry out its authority to raise a revenue, and to transfer and disburse the same. It was argued also that the tax on the circulation operated very remotely, if at all, on the only functions of the bank in which the government was interested. But the court, by a unanimous judgment, held the law of Maryland to be unconstitutional.

It is not possible to condense the conclusive argument of Chief Justice Marshall in that case, and it is too familiar to justify its reproduction here; but an extract or two, in which the results of his reasoning are stated, will serve to show its applicability to the case before us. "That the power of taxing the bank by the states," he says, "may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power which acknowledges no other limits than those prescribed by the constitution, and, like sovereign power of any description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state in the article of taxation is subordinate to, and may be controlled by, the constitution of the United States." Again he says, "We find, then, on just theory, a total failure of the original right to tax the means employed by the government of the Union for the execution of its powers. The right never existed, and the question of its surrender cannot arise." . . . "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very means, is declared to be supreme over that which exerts the control, are propositions not to be denied. If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states."

§ 1273. *The amount or extent of a tax cannot influence the court in the consideration of its soundness from the standpoint of principle.*

It will be observed that it was not the extent of the tax in that case which was complained of, but the right to levy any tax of that character. So in the

case before us it may be said that a tax of \$1 for passing through the state of Nevada, by stage-coach or by railroad, cannot sensibly affect any function of the government, or deprive a citizen of any valuable right. But if the state can tax a railroad passenger \$1, it can tax him \$1,000. If one state can do this so can every other state. And thus one or more states, covering the only practical routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other.

A case of another character, in which the taxing power as exercised by a state was held void because repugnant to the federal constitution, is that of *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*). The state of Maryland required all importers of foreign merchandise, who sold the same by wholesale, by bale or by package, to take out a license, and this act was claimed to be unconstitutional. The court held it to be so on three different grounds: first, that it was a duty on imports; second, that it was a regulation of commerce; and third, that the importer who had paid the duties imposed by the United States had acquired a right to sell his goods in the same original packages in which they were imported. To say nothing of the first and second grounds, we have in the third a tax of a state declared to be void, because it interfered with the exercise of a right derived by the importer from the laws of the United States. If the right of passing through a state by a citizen of the United States is one guarantied to him by the constitution, it must be as sacred from state taxation as the right derived by the importer from the payment of duties to sell the goods on which the duties were paid.

In the case of *Weston v. City Council of Charleston*, 2 Pet., 449 (§§ 399-407, *supra*), we have a case of state taxation of still another class, held to be void as an interference with the rights of the federal government. The tax in that instance was imposed on bonds or stocks of the United States, in common with all other securities of the same character. It was held by the court that the free and successful operation of the government required it at times to borrow money; that to borrow money it was necessary to issue this class of national securities, and that if the states could tax these securities they might so tax them as to seriously impair or totally destroy the power of the government to borrow. This case, itself based on the doctrines advanced by the court in *McCulloch v. State of Maryland*, has been followed in all the recent cases involving state taxation of government bonds, from that of *Bank of Commerce v. New York City*, 2 Black, 620 (§§ 408-413, *supra*), to the decisions of the court at this term. In all these cases the opponents of the taxes levied by the states were able to place their opposition on no express provision of the constitution, except in that of *Brown v. Maryland*. But in all the other cases, and in that case also, the court distinctly placed the invalidity of the state taxes on the ground that they interfered with an authority of the federal government, which was itself only to be sustained as necessary and proper to the exercise of some other power expressly granted.

In The Passenger Cases, to which reference has already been made, Justice Grier, with whom Justice Catron concurred, makes this one of the four propositions on which they held the tax void in those cases. Judge Wayne expresses his assent to Judge Grier's views; and perhaps this ground received the concurrence of more of the members of the court who constituted the majority than any other. But the principles here laid down may be found more clearly stated in the dissenting opinion of the chief justice in those cases,

and with more direct pertinency to the case now before us than anywhere else. After expressing his views fully in favor of the validity of the tax, which he said had exclusive reference to foreigners, so far as those cases were concerned, he proceeds to say, for the purpose of preventing misapprehension, that so far as the tax affected American citizens it could not, in his opinion, be maintained. He then adds: "Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States, from the most remote states or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every state in the Union. . . . For all the great purposes for which the federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own states. And a tax imposed by a state, for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other states as members of the Union, and with the objects which that Union was intended to attain. Such a power in the states could produce nothing but discord and mutual irritation, and they very clearly do not possess it."

Although these remarks are found in a dissenting opinion, they do not relate to the matter on which the dissent was founded. They accord with the inferences which we have already drawn from the constitution itself, and from the decisions of this court in exposition of that instrument.

Those principles, as we have already stated them in this opinion, must govern the present case.

*Reversed.*

MR. JUSTICE CLIFFORD held that the judgment of the court should have been placed exclusively on the ground that the act was inconsistent with the power conferred upon congress to regulate commerce among the several states. The CHIEF JUSTICE concurred in this view.

#### CITY OF NEW YORK v. MILN.

(11 Peters, 102-161. 1837.)

Opinion by MR. JUSTICE BARBOUR.

STATEMENT OF FACTS.—This case comes before this court upon a certificate of division of the circuit court of the United States for the southern district of New York:

It was an action of debt brought in that court by the plaintiff, to recover of the defendant, as consignee of the ship called the *Emily*, the amount of certain penalties imposed by a statute of New York, passed February 11, 1824, entitled An act concerning passengers in vessels coming to the port of New York. The statute, amongst other things, enacts that every master or commander of any ship, or other vessel, arriving at the port of New York, from any country out of the United States, or from any other of the United States than the state of New York, shall, within twenty-four hours after the arrival of such ship or vessel in the said port, make a report in writing, on oath or affirmation, to the mayor of the city of New York, or, in case of his sickness or absence, to the recorder of the said city, of the name, place of birth, and last legal settlement, age and occupation, of every person who shall have

been brought as a passenger in such ship or vessel, on her last voyage from any country out of the United States into the port of New York, or any of the United States, and from any of the United States other than the state of New York, to the city of New York, and of all passengers who shall have landed, or been suffered or permitted to land, from such ship or vessel at any place, during such her last voyage, or have been put on board, or suffered, or permitted to go on board, of any other ship or vessel, with the intention of proceeding to the said city, under the penalty on such master or commander, and the owner or the owners, consignee or consignees of such ship or vessel, severally and respectively, of \$75 for every person neglected to be reported as aforesaid, and for every person whose name, place of birth, and last legal settlement, age and occupation, or either or any of such particulars, shall be falsely reported as aforesaid, to be sued for and recovered as therein provided.

The declaration alleges that the defendant was consignee of the ship Emily, of which a certain William Thompson was master; and that in the month of August, 1829, said Thompson, being master of such ship, did arrive with the same in the port of New York, from a country out of the United States, and that one hundred passengers were brought in said ship on her then last voyage, from a country out of the United States, into the port of New York; and that the said master did not make the report required by the statute, as before recited.

The defendant demurred to the declaration. The plaintiff joined in the demurrer, and the following point, on a division of the court, was thereupon certified to this court, namely, "That the act of the legislature of New York, mentioned in the plaintiff's declaration, assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void."

It is contended by the counsel for the defendant that the act in question is a regulation of commerce; that the power to regulate commerce is, by the constitution of the United States, granted to congress; that this power is exclusive, and that consequently the act is a violation of the constitution of the United States. On the part of the plaintiff it is argued that an affirmative grant of power previously existing in the states to congress is not exclusive; except, 1st, where it is so expressly declared in terms, by the clause giving the power; or 2dly, where a similar power is prohibited to the states; or 3dly, where the power in the states would be repugnant to, and incompatible with, a similar power in congress; that this power falls within neither of these predicaments; that it is not, in terms, declared to be exclusive; that it is not prohibited to the states; and that it is not repugnant to, or incompatible with, a similar power in congress; and that having pre-existed in the states, they therefore have a concurrent power in relation to the subject; and that the act in question would be valid, even if it were a regulation of commerce, it not contravening any regulation made by congress.

§ 1274. *Power to make police regulations is not taken from the states.*

But they deny that it is a regulation of commerce; on the contrary, they assert that it is a mere regulation of internal police, a power over which is not granted to congress; and which, therefore, as well upon the true construction of the constitution as by force of the tenth amendment to that instrument, is reserved to, and resides in, the several states.

We shall not enter into any examination of the question whether the power

to regulate commerce be or be not exclusive of the states, because the opinion which we have formed renders it unnecessary; in other words, we are of opinion that the act is not a regulation of commerce, but of police; and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the states. That the state of New York possessed power to pass this law before the adoption of the constitution of the United States might probably be taken as a truism, without the necessity of proof. But as it may tend to present it in a clearer point of view, we will quote a few passages from a standard writer upon public law, showing the origin and character of this power.

Vattel, book 2, ch. 7, § 94. "The sovereign may forbid the entrance of his territory, either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state." Ibid., ch. 8, § 100. "Since the lord of the territory may, whenever he thinks proper, forbid its being entered, he has, no doubt, a power to annex what conditions he pleases to the permission to enter." The power, then, of New York to pass this law having undeniably existed at the formation of the constitution, the simple inquiry is, whether, by that instrument, it was taken from the states, and granted to congress; for if it were not, it yet remains with them.

§ 1275. — *and a law requiring a report as to passengers brought into the state is a police regulation.*

If, as we think, it be a regulation, not of commerce, but police, then it is not taken from the states. To decide this, let us examine its purpose, the end to be attained, and the means of its attainment. It is apparent, from the whole scope of the law, that the object of the legislature was to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the states; and for that purpose a report was required of the names, places of birth, etc., of all passengers, that the necessary steps might be taken by the city authorities to prevent them from becoming chargeable as paupers.

Now, we hold that both the end and the means here used are within the competency of the states, since a portion of their powers were surrendered to the federal government. Let us see what powers are left with the states. The Federalist, in the forty-fifth number, speaking of this subject, says, the powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the state. And this court, in the case of *Gibbons v. Ogden*, 9 Wheat., 203 (§§ 1183-1201, *supra*), which will hereafter be more particularly noticed, in speaking of the inspection laws of the states, say, they form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government, all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

Now, if the act in question be tried by reference to the delineation of power laid down in the preceding quotations, it seems to us that we are necessarily brought to the conclusion that it falls within its limits. There is no aspect in which it can be viewed in which it transcends them. If we look at the place

of its operation, we find it to be within the territory, and therefore within the jurisdiction, of New York. If we look at the person on whom it operates, he is found within the same territory and jurisdiction. If we look at the persons for whose benefit it was passed, they are the people of New York, for whose protection and welfare the legislature of that state are authorized and in duty bound to provide. If we turn our attention to the purpose to be attained, it is to secure that very protection, and to provide for that very welfare. If we examine the means by which these ends are proposed to be accomplished, they bear a just, natural and appropriate relation to those ends.

§ 1276. *Authorities reviewed.*

But we are told that it violates the constitution of the United States, and to prove this we have been referred to two cases in this court; the first, that of *Gibbons v. Ogden*, 9 Wheat., 1, and the other that of *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*). The point decided in the first of these cases is, that the acts of the legislature of New York, granting to certain individuals the exclusive navigation of all the waters within the jurisdiction of that state, with boats moved by steam, for a term of years, are repugnant to the clause of the constitution of the United States which authorizes congress to regulate commerce, so far as the said acts prohibit vessels licensed according to the laws of the United States for carrying on the coasting trade, from navigating said waters by means of steam. In coming to that conclusion, this court, in its reasoning, laid down several propositions; such as that the power over commerce included navigation; that it extended to the navigable waters of the states; that it extended to navigation carried on by vessels exclusively employed in transporting passengers. Now, all this reasoning was intended to prove that a steam vessel, licensed for the coasting trade, was lawfully licensed by virtue of an act of congress; and that as the exclusive right to navigate the waters of New York, granted by the law of that state, if suffered to operate, would be in collision with the right of the vessel licensed under the act of congress to navigate the same waters; and that as when that collision occurred the law of the states must yield to that of the United States, when lawfully enacted, therefore, the act of the state of New York was in that case void.

The second case, to wit, that of *Brown v. State of Maryland*, 12 Wheat., 419, decided that the act of the state of Maryland, requiring all importers of foreign goods by the bale or package, and other persons selling the same by wholesale, bale or package, etc., to take out a license for which they should pay \$50, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures and penalties, was repugnant, first, to that provision of the constitution of the United States which declares that "no state shall, without the consent of congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and secondly, to that which declares that congress shall have power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes."

Now, it is apparent from this short analysis of these two cases, that the question involved in this case is not the very point which was decided in either of those which have been referred to. Let us examine whether, in the reasoning of the court, there is any principle laid down in either of them which will go to prove that the section of the law of New York on which this prosecution is founded is a violation of the constitution of the United States. In *Gibbons v. Ogden*, 9 Wheat., 1, the law of the state assumed to exercise authority over the navigable waters of the state; to do so, by granting a privilege to certain

individuals, and by excluding all others from navigating them by vessels propelled by steam; and in the particular case, this law was brought to bear in its operation directly upon a vessel sailing under a coasting license from the United States. The court were of opinion that as the power to regulate commerce embraced within its scope that of regulating navigation also; as the power over navigation extended to all the navigable waters of the United States; as the waters on which Gibbons' vessel was sailing were navigable; and as his vessel was sailing under the authority of an act of congress,—the law of the state, which assumed by its exclusive privilege granted to others, to deprive a vessel thus authorized of the right of navigating the same waters, was a violation of the constitution of the United States, because it directly conflicted with the power of congress to regulate commerce. Now, there is not, in this case, one of the circumstances which existed in that of *Gibbons v. Ogden*, which, in the opinion of the court, rendered it obnoxious to the charge of unconstitutionality.

On the contrary, the prominent facts of this case are in striking contrast with those which characterized that. In that case, the theater on which the law operated was navigable water, over which the court say that the power to regulate commerce extended; in this, it was the territory of New York, over which that state possesses an acknowledged and undisputed jurisdiction for every purpose of internal regulation, in that the subject-matter on which it operated was a vessel claiming the right of navigation; a right which the court say is embraced in the power to regulate commerce; in this, the subjects on which it operates are persons whose rights and whose duties are rightfully prescribed and controlled by the laws of the respective states within whose territorial limits they are found; in that, say the court, the act of a state came into direct collision with an act of the United States; in this, no such collision exists.

Nor is there the least likeness between the facts of this case and those of *Brown v. The State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*). The great grounds upon which the court put that case were, that sale is the object of all importation of goods; that therefore the power to allow importation implied the power to authorize the sale of the thing imported; that a penalty inflicted for selling an article, in the character of importer, was in opposition to the act of congress which authorized importation under the authority to regulate commerce; that a power to tax an article in the hands of the importer the instant it was landed, was the same in effect as a power to tax it whilst entering the port; that, consequently, the law of Maryland was obnoxious to the charge of unconstitutionality, on the ground of its violating the two provisions of the constitution, the one giving to congress the power to regulate commerce, the other forbidding the states from taxing imports. In this case, it will be seen that the discussion of the court had reference to the extent of the power given to congress to regulate commerce, and to the extent of the prohibition upon the states from imposing any duty upon imports. Now it is difficult to perceive what analogy there can be between a case where the right of the state was inquired into, in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to its right over persons within its acknowledged jurisdiction; the goods are the subject of commerce, the persons are not; the court did indeed extend the power to regulate commerce so as to protect the goods imported from a state tax after they were landed, and were yet in bulk; but why? Because they were the subjects

of commerce; and because, as the power to regulate commerce, under which the importation was made, implied a right to sell; that right was complete, without paying the state for a second right to sell, whilst the bales or packages were in their original form. But how can this apply to persons? They are not the subject of commerce; and not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to congress to regulate commerce, and the prohibition to the states from imposing a duty on imported goods.

Whilst, however, neither of the points decided in the cases thus referred to is the same with that now under consideration, and whilst the general scope of the reasoning of the court in each of them applies to questions of a different nature, there is a portion of that reasoning in each which has a direct bearing upon the present subject, and which would justify measures on the part of the states, not only approaching the line which separates regulations of commerce from those of police, but even those which are almost identical with the former class, if adopted in the exercise of one of their acknowledged powers. In *Gibbons v. Ogden*, 9 Wheat., 204 (§§ 1183-1201, *supra*), the court say, if a state, in passing laws on a subject acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the state and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

§ 1277. *Where a state is acting within the scope of its power, it may adopt the means appropriate to an end.*

In page 209 the court say: "Since, however, in regulating their own purely internal affairs, whether of trading or of police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, they would inquire whether there was such collision in that case, and they came to the conclusion that there was. From this it appears that, whilst a state is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by congress acting under a different power; subject only, say the court, to this limitation, that, in the event of collision, the law of the state must yield to the law of congress. The court must be understood, of course, as meaning that the law of congress is passed upon a subject within the sphere of its power. Even then, if the section of the act in question could be considered as partaking of the nature of a commercial regulation, the principle here laid down would save it from condemnation, if no such collision exist.

It has been contended at the bar that there is that collision; and, in proof of it, we have been referred to the Revenue Act of 1799 (1 Stats. at Large, 627), and to the act of 1819 (3 id., 488), relating to passengers. The whole amount of the provision in relation to this subject, in the first of these acts, is to require, in the manifest of a cargo of goods, a statement of the names of the passengers, with their baggage, specifying the number and description of pack-



ages belonging to each respectively; now it is apparent, as well from the language of this provision as from the context, that the purpose was to prevent goods being imported without paying the duties required by law, under the pretext of being the baggage of passengers. The act of 1819 contains regulations obviously designed for the comfort of the passengers themselves; for this purpose, it prohibits the bringing more than a certain number, proportioned to the tonnage of the vessel, and prescribes the kind and quality of provisions, or sea stores, and their quantity, in a certain proportion to the number of the passengers.

Another section\* requires the master to report to the collector a list of all passengers, designating the age, sex, occupation, the country to which they belong, etc.; which list is required to be delivered to the secretary of state, and which he is directed to lay before congress. The object of this clause, in all probability, was to enable the government of the United States to form an accurate estimate of the increase of population by emigration; but whatsoever may have been its purpose, it is obvious that these laws only affect, through the power over navigation, the passengers whilst on their voyage, and until they shall have landed. After that, and when they have ceased to have any connection with the ship, and when, therefore, they have ceased to be passengers, we are satisfied that acts of congress, applying to them as such, and only professing to legislate in relation to them as such, have then performed their office, and can, with no propriety of language, be said to come into conflict with the law of a state, whose operation only begins when that of the laws of congress ends; whose operation is not even on the same subject, because, although the person on whom it operates is the same, yet, having ceased to be a passenger, he no longer stands in the only relation in which the laws of congress either professed or intended to act upon him. There is, then, no collision between the law in question and the acts of congress just commented on; and, therefore, if the state law were to be considered as partaking of the nature of a commercial regulation, it would stand the test of the most rigid scrutiny, if tried by the standard laid down in the reasoning of the court, quoted from the case of *Gibbons v. Ogden*.

#### § 1278. *Powers of the states.*

But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty, of a state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.

We are aware that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now

considering. If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it; whether it related to their rights, or their duties; whether it respected them as men, or as citizens of the state; whether in their public or private relations; whether it related to the rights of persons, or of property, of the whole people of a state, or of any individual within it; and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction. But we will endeavor to illustrate our meaning rather by exemplification than by definition. No one will deny that a state has a right to punish any individual found within its jurisdiction, who shall have committed an offense within its jurisdiction against its criminal laws. We speak not here of foreign ambassadors, as to whom the doctrines of public law apply. We suppose it to be equally clear that a state has as much right to guard, by anticipation, against the commission of an offense against its laws, as to inflict punishment upon the offender after it shall have been committed. The right to punish, or to prevent, crime does in no degree depend upon the citizenship of the party who is obnoxious to the law. The alien who shall just have set his foot upon the soil of the state is just as subject to the operation of the law as one who is a native citizen. In this very case, if either the master, or one of the crew, of the *Emily*, or one of the passengers who were landed, had, the next hour after they came on shore, committed an offense, or indicated a disposition to do so, he would have been subject to the criminal law of New York, either by punishment for the offense committed, or by prevention from its commission where good ground for apprehension was shown, by being required to enter into a recognizance with surety, either to keep the peace, or be of good behavior, as the case might be; and if he failed to give it, by liability to be imprisoned in the discretion of the competent authority. Let us follow this up to its possible results. If every officer and every seaman belonging to the *Emily* had participated in the crime, they would all have been liable to arrest and punishment, although thereby the vessel would have been left without either commander or crew. Now, why is this? For no other reason than this, simply: that, being within the territory and jurisdiction of New York, they were liable to the laws of that state; and, amongst others, to its criminal laws; and this, too, not only for treason, murder, and other crimes of that degree of atrocity, but for the most petty offense which can be imagined.

It would have availed neither officer, seaman or passenger to have alleged either of these several relations in the recent voyage across the Atlantic. The short but decisive answer would have been, that we know you now only as offenders against the criminal laws of New York, and being now within her jurisdiction, you are now liable to the cognizance of those laws. Surely, the officers and seamen of the vessel have not only as much, but more, concern with navigation than a passenger; and yet, in the case here put, any and every one of them would be held liable. There would be the same liability, and for the same reasons, on the part of the officers, seamen and passengers to the civil process of New York, in a suit for the most trivial sum; and if, according to the laws of that state, the party might be arrested and held to bail, in the event of his failing to give it he might be imprisoned until discharged by law. Here, then, are the officers and seamen, the very agents of navigation, liable to be arrested and imprisoned under civil process, and to arrest and punishment under the criminal law. But the instrument of navigation, that is, the vessel,

when within the jurisdiction of the state, is also liable by its laws to execution. If the state have a right to vindicate its criminal justice against the officers, seamen and passengers who are within its jurisdiction, and also in the administration of its civil justice, to cause process of execution to be served on the body of the very agents of navigation, and also on the instrument of navigation, under which it may be sold, because they are within its jurisdiction and subject to its laws, the same reasons, precisely, equally subject the master, in the case before the court, to liability for failure to comply with the requisitions of the section of the statute sued upon. Each of these laws depends upon the same principle for its support; and that is that it was passed by the state of New York, by virtue of her power to enact such laws for her internal police as she deemed best, which laws operate upon the persons and things within her territorial limits, and therefore within her jurisdiction.

§ 1279. *The act of New York of 1824, being intended to protect New York against the importation of foreign paupers, was an internal police regulation, and constitutional.*

Now, in relation to the section in the act immediately before us, that is obviously passed with a view to prevent her citizens from being oppressed by the support of multitudes of poor persons who come from foreign countries without possessing the means of supporting themselves. There can be no mode in which the power to regulate internal police could be more appropriately exercised. New York, from her particular situation, is, perhaps, more than any other city in the Union, exposed to the evil of thousands of foreign emigrants arriving there, and the consequent danger of her citizens being subjected to a heavy charge in the maintenance of those who are poor. It is the duty of the state to protect its citizens from this evil; they have endeavored to do so, by passing, amongst other things, the section of the law in question. We should, upon principle, say that it had a right to do so.

Let us compare this power with a mass of power, said by this court in *Gibbons v. Ogden*, 9 Wheat., 1, not to be surrendered to the general government. They are inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, etc. To which it may be added, that this court, in *Brown v. State of Maryland*, 12 Wheat., 419, admits the power of a state to direct the removal of gunpowder, as a branch of the police power, which unquestionably remains, and ought to remain, with the states.

It is easy to show that if these powers, as is admitted, remain with the states, they are stronger examples than the one now in question. The power to pass inspection laws involves the right to examine articles which are imported, and are, therefore, directly the subject of commerce; and if any of them are found to be unsound, or infectious, to cause them to be removed or even destroyed. But the power to pass these inspection laws is itself a branch of the general power to regulate internal police. Again, the power to pass quarantine laws operates on the ship which arrives, the goods which it brings, and all persons in it, whether the officers and crew, or the passengers; now the officers and crew are the agents of navigation; the ship is an instrument of it, and the cargo on board is the subject of commerce, and yet it is not only admitted that this power remains with the states, but the laws (1 Stats. at Large, 474; 4 id., 577) of the United States expressly sanction the quarantines, and other restraints which shall be required and established by the health laws of any state, and

declare that they shall be duly observed by the collectors and all other revenue officers of the United States.

We consider it unnecessary to pursue this comparison further; because we think that, if the stronger powers, under the necessity of the case, by inspection laws and quarantine laws, to delay the landing of a ship and cargo, which are the subjects of commerce and navigation, and to remove or even to destroy unsound and infectious articles, also the subject of commerce, can be rightfully exercised, then that it must follow as a consequence, that powers less strong, such as the one in question, which operates upon no subject either of commerce or navigation, but which operates alone within the limits and jurisdiction of New York upon a person at the time not even engaged in navigation, is still more clearly embraced within the general power of the states to regulate their own internal police, and to take care that no detriment come to the commonwealth.

We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship the crew of which may be laboring under an infectious disease.

§ 1280. — *said act is not affected by any treaties of the United States.*

As to any supposed conflict between this provision and certain treaties of the United States, by which reciprocity as to trade and intercourse is granted to the citizens of the governments with which those treaties were made, it is obvious to remark that the record does not show that any person in this case was a subject or citizen of a country to which treaty stipulation applies; but, moreover, those which we have examined stipulate that the citizens and subjects of the contracting parties shall submit themselves to the laws, decrees and usages to which native citizens and subjects are subjected. We are therefore of opinion, and do direct it to be certified to the circuit court for the southern district of New York, that so much of the section of the act of the legislature of New York as applies to the breaches assigned in the declaration does not assume to regulate commerce between the port of New York and foreign ports, and that so much of said section is constitutional.

We express no opinion on any other part of the act of the legislature of New York, because no question could arise in the case in relation to any part of the act except that declared upon.

Dissenting opinion by MR. JUSTICE STORY.

The present case comes before the court upon a certificate of division of opinion of the judges of the circuit court of the southern district of New York. Of course, according to the well known practice of this court, and the mandates of the law, we can look only to the question certified to us, and to it in the very form in which it is certified. In the circuit court, the following point was presented on the part of the defendant, viz.: that the act of the legislature of the state of New York, mentioned in the plaintiff's declaration, assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void. And this point constitutes the matter of division in the circuit court, and that upon which our opinion is now required.

The act of New York, here referred to, was passed on the 11th of February, 1824, and is entitled "An act concerning passengers in vessels coming to the

port of New York." By the first section it requires the master of any ship arriving at the port of New York, from any country out of the United States, or from any other of the United States than New York, within twenty-four hours after the arrival, to make a report in writing, on oath or affirmation, to the mayor of the city, etc., of the name, place of birth, and last legal settlement, age and occupation of every passenger brought in the ship on her last voyage from any foreign country, or from any other of the United States to the city of New York, and of all passengers landed, or suffered or permitted to land, at any place during her last voyage, or put on board, or suffered or permitted to go on board, of any other ship with an intention of proceeding to the said city, under the penalty of \$75 for every passenger not so reported, to be paid by the master, owner or consignee. The second section makes it lawful for the mayor, etc., to require every such master to give bond, with two sufficient sureties, in a sum not exceeding \$300 for each passenger, not being a citizen of the United States, to indemnify and save harmless the mayor, etc., and overseers of the poor from all expense and charge which may be incurred for the maintenance and support of every such passenger, etc., under a penalty of \$500. The third section provides that, whenever any person brought in such ship, and being a citizen of the United States, shall be by the mayor, etc., deemed likely to become chargeable to the city, the master or owner shall, upon an order for this purpose, remove every such person without delay to the place of his last settlement, and in default shall be chargeable with the expenses of the maintenance and removal of such person. The fourth section requires persons not citizens, entering into the city with the intention of residing there, to make a report prescribed by the act, under the penalty of \$100. The fifth section provides for the manner of recovering the penalties. The sixth section makes the ship liable to attachment and seizure for the penalties. The seventh section repeals former acts; and the eighth and last section declares persons swearing or affirming falsely, in the premises, guilty of perjury, and punishable accordingly.

Such is the substance of the act; it is apparent that it applies to all vessels coming from foreign ports, and to all coasting vessels and steamboats from other states, and to all foreigners, and to all citizens, who are passengers, whether they come from foreign ports or from other states. It applies, also, not only to passengers who arrive at New York, but to all passengers landed in other states, or put on board of other vessels, although not within the territorial jurisdiction or limits of New York.

§ 1281. *Vessels carrying passengers are within the constitutional powers of congress to regulate commerce.*

The questions then presented for our consideration under these circumstances are, first, whether this act assumes to regulate trade and commerce between the port of New York and foreign ports. Secondly, if it does, whether it is unconstitutional and void. The counsel for the plaintiff assert the negative; the counsel for the defendant maintain the affirmative on both points. In considering the first point, we are spared even the necessity of any definition or interpretation of the words of the constitution, by which power is given to congress "to regulate commerce with foreign nations, and among the several states;" for the subject was most elaborately considered in *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *supra*). On that occasion, Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "Commerce undoubtedly is traffic; but it is something more. It is intercourse. It describes the commer-

cial intercourse between nations, and parts of nations, in all its branches; and is regulated by prescribing rules for carrying on that intercourse." 9 Wheat., 189. And again, "these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend." 9 Wheat., 193, 194. "In regulating commerce with foreign nations the power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines." "If congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of congress may be exercised within a state." 9 Wheat., 195. "The power of congress then comprehends navigation within the limits of every state in the Union, so far as that navigation may be connected with commerce, with foreign nations, or among the several states." 9 Wheat., 197. And again, "It is the power to regulate, that is, to prescribe the rule, by which commerce is governed." 9 Wheat., 196. But what is most important to the point now under consideration, it was expressly decided in that case, that vessels engaged in carrying passengers were as much within the constitutional power of congress to regulate commerce, as vessels engaged in the transportation of goods. "Vessels," said the chief justice, "have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be on that account withdrawn from the control or protection of congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them." And again, "A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of a cargo." 9 Wheat., 215, 216. And this language is the more impressive, because the case then before the court was that of a steamboat, whose principal business was the transportation of passengers. If, then, the regulation of passenger ships be in truth a regulation of trade and commerce, it seems very difficult to escape from the conclusion that the act in controversy is, in the sense of the objection, an act which assumes to regulate trade and commerce between the port of New York and foreign ports. It requires a report, not only of passengers who arrive at New York, but of all who have been landed at any places out of the territorial limits of New York, whether in foreign ports or in the ports of other states. It requires bonds to be given by the master or owner for all passengers not citizens; and it compels them to remove, or pay the expenses of removal of, all passengers who are citizens, and are deemed likely to become chargeable to the city, under severe penalties. If these enactments had been contained in any act passed by congress, it would not have been doubted that they were regulations of passenger ships engaged in foreign commerce. Is their character changed by their being found in the laws of a state?

I admit, in the most unhesitating manner, that the states have a right to pass health laws and quarantine laws, and other police laws, not contravening the laws of congress rightfully passed under their constitutional authority. I admit that they have a right to pass poor laws, and laws to prevent the introduction of paupers into the state, under the like qualifications. I go further, and admit that, in the exercise of their legitimate authority over any particular sub-

ject, the states may generally use the same means which are used by congress, if these means are suitable to the end. But I cannot admit that the states have authority to enact laws which act upon subjects beyond their territorial limits, or within those limits, and which trench upon the authority of congress in its power to regulate commerce. It was said by this court in the case of *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*), that even the acknowledged power of taxation by a state cannot be so exercised as to interfere with any regulation of commerce by congress.

It has been argued that the act of New York is not a regulation of commerce, but is a mere police law upon the subject of paupers; and it has been likened to the cases of health laws, quarantine laws, ballast laws, gunpowder laws, and others of a similar nature. The nature and character of these laws were fully considered, and the true answer given to them, in the case of *Gibbons v. Ogden*, 9 Wheat., 1; and though the reasoning there given might be expanded, it cannot in its grounds and distinctions be more pointedly illustrated, or better expounded. I have already said that I admit the power of the states to pass such laws, and to use the proper means to effectuate the objects of them; but it is with this reserve, that these means are not exclusively vested in congress. A state cannot make a regulation of commerce to enforce its health laws, because it is a means withdrawn from its authority. It may be admitted that it is a means adapted to the end; but it is quite a different question whether it be a means within the competency of the state jurisdiction. The states have a right to borrow money; and borrowing by the issue of bills of credit would certainly be an appropriate means; but we all know that the emission of bills of credit by a state is expressly prohibited by the constitution. If the power to regulate commerce be exclusive in congress, then there is no difference between an express and an implied prohibition upon the states.

But how can it be truly said that the act of New York is not a regulation of commerce? No one can well doubt that if the same act had been passed by congress it would have been a regulation of commerce; and in that way, and in that only, would it be a constitutional act of congress. The right of congress to pass such an act has been expressly conceded at the argument. The act of New York purports on its very face to regulate the conduct of masters, and owners, and passengers, in foreign trade, and in foreign ports and places. Suppose the act had required that the master and owner of ships should make report of all goods taken on board or landed in foreign ports, and of the nature, qualities and value of such goods; could there be a doubt that it would have been a regulation of commerce? If not, in what essential respect does the requirement of a report of the passengers taken or landed in a foreign port or place differ from the case put? I profess not to be able to see any. I listened with great attention to the argument, to ascertain upon what ground the act of New York was to be maintained not to be a regulation of commerce. I confess that I was unable to ascertain any, from the reasoning of either of the learned counsel who spoke for the plaintiff. Their whole argument on this point seemed to me to amount to this: that if it were a regulation of commerce, still it might also be deemed a regulation of police, and a part of the system of poor laws; and therefore justifiable as a means to attain the end. In my judgment, for the reasons already suggested, that is not a just consequence or a legitimate deduction. If the act is a regulation of commerce, and that subject belongs exclusively to congress, it is a means cut off from the range of state sovereignty and state legislation.

§ 1282. *The power of congress to regulate commerce is deemed exclusive, and not concurrent with the states.*

And this leads me more distinctly to the consideration of the other point in question; and that is, whether, if the act of New York be a regulation of commerce, it is void and unconstitutional? If the power of congress to regulate commerce be an exclusive power; or if the subject-matter has been constitutionally regulated by congress, so as to exclude all additional or conflicting legislation by the states, then, and in either case, it is clear that the act of New York is void and unconstitutional. Let us consider the question under these aspects. It has been argued that the power of congress to regulate commerce is not exclusive, but concurrent with that of the states. If this were a new question in this court, wholly untouched by doctrine or decision, I should not hesitate to go into a full examination of all the grounds upon which concurrent authority is attempted to be maintained. But in point of fact, the whole argument on this very question, as presented by the learned counsel on the present occasion, was presented by the learned counsel who argued the case of *Gibbons v. Ogden*, 9 Wheat., 1; and it was then deliberately examined and deemed inadmissible by the court. Mr. Chief Justice Marshall, with his accustomed accuracy and fullness of illustration, reviewed at that time the whole grounds of the controversy; and from that time to the present, the question has been considered (as far as I know) to be at rest. The power given to congress to regulate commerce with foreign nations, and among the states, has been deemed exclusive, from the nature and object of the power, and the necessary implications growing out of its exercise. Full power to regulate a particular subject implies the whole power and leaves no residuum; and a grant of the whole to one is incompatible with a grant to another of a part. When a state proceeds to regulate commerce with foreign nations, or among the states, it is doing the very thing which congress is authorized to do. *Gibbons v. Ogden*, 9 Wheat., 198, 199. And it has been remarked, with great cogency and accuracy, that the regulation of a subject indicates and designates the entire result; applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that upon which it has operated. *Gibbons v. Ogden*, 9 Wheat., 209.

This last suggestion is peculiarly important in the present case; for congress has, by the act of the 2d of March, 1819, ch. 170, regulated passenger ships and vessels. Subject to the regulations therein provided, passengers may be brought into the United States from foreign ports. These regulations, being all which congress have chosen to enact, amount, upon the reasoning already stated, to a complete exercise of its power over the whole subject, as well in what is omitted as in what is provided for. Unless, then, we are prepared to say that wherever congress has legislated upon this subject, clearly within its constitutional authority, and made all such regulations as in its own judgment and discretion were deemed expedient, the states may step in and supply all other regulations which they may deem expedient, as complementary to those of congress, thus subjecting all our trade, commerce and navigation, and intercourse with foreign nations, to the double operations of distinct and independent sovereignties, it seems to me impossible to maintain the doctrine that the states have a concurrent jurisdiction with congress on the regulation of com-



merce, whether congress has or has not legislated upon the subject; but *a fortiori* when it has legislated.

§ 1283. *Said act of New York is in conflict with the laws of congress authorizing the transportation and introduction of passengers into the United States.*

There is another consideration which ought not to be overlooked in discussing this subject. It is that congress, by its legislation, has in fact authorized not only the transportation, but the introduction, of passengers into the country. The act of New York imposes restraints and burdens upon this right of transportation and introduction. It goes even further, and authorizes the removal of passengers, under certain circumstances, out of the state, and at the expense of the master and owner in whose ship they have been introduced; and this though they are citizens of the United States, and were brought from other states. Now, if this act be constitutional to this extent, it will justify the states in regulating, controlling, and, in effect, interdicting the transportation of passengers from one state to another in steamboats and packets. They may levy a tax upon all such passengers; they may require bonds from the master that no such passengers shall become chargeable to the state; they may require such passengers to give bonds that they shall not become so chargeable; they may authorize the immediate removal of such passengers back to the place from which they came. These would be most burdensome and inconvenient regulations respecting passengers, and would entirely defeat the object of congress in licensing the trade or business. And yet, if the argument which we have heard be well founded, it is a power strictly within the authority of the states, and may be exerted at the pleasure of all or any of them, to the ruin and perhaps annihilation of our passenger navigation. It is no answer to the objection to say that the states will have too much wisdom and prudence to exercise the authority to so great an extent. Laws were actually passed of a retaliatory nature by the states of New York, New Jersey and Connecticut during the steamboat controversy, which threatened the safety and security of the Union; and demonstrated the necessity that the power to regulate commerce among the states should be exclusive in the Union, in order to prevent the most injurious restraints upon it.

In the case of *Brown v. State of Maryland*, 12 Wheat., 419, the state had by an act required that every importer of foreign goods, selling the same by wholesale, should, before he was authorized to sell the same, take out a license for which he should pay \$50; and in default, the importer was subjected to a penalty. The question was, whether the state legislature could constitutionally require the importer of foreign goods to take out such a license, before he should be permitted to sell the same in the imported package? The court held that the act was unconstitutional and void, as laying a duty on imports, and also as interfering with the power of congress to regulate commerce. On that occasion arguments were addressed to the court on behalf of the state of Maryland, by their learned counsel, similar to those which have been addressed to us on the present occasion; and in a particular manner the arguments that the act did not reach the property until after its arrival within the territorial limits of the state; that it did not obstruct the importation, but only the sale of goods after the importation. The court said: "There is no difference, in effect, between the power to prohibit the sale of an article and the power to prohibit its introduction into the country. The one would be a necessary consequence of the other. None would be imported if none could be sold." "It

is obvious that the same power which imposes a light duty can impose a heavy one, which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." "The power claimed by the state is, in its nature, in conflict with that given to congress to regulate commerce; and the greater or less extent to which it may be exercised does not enter into the inquiry concerning its existence." "Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to congress to regulate commerce; since an essential part of that regulation, and principal object of it, is to prescribe the regular means of accomplishing that introduction and incorporation."

This whole reasoning is directly applicable to the present case; if, instead of the language respecting the introduction and importation of goods, we merely substitute the words respecting the introduction and importation of passengers, we shall instantly perceive its full purpose and effect. The result of the whole reasoning is, that whatever restrains or prevents the introduction or importation of passengers or goods into the country, authorized and allowed by congress, whether in the shape of a tax or other charge, or whether before or after their arrival in port, interferes with the exclusive right of congress to regulate commerce. Such is a brief view of the grounds upon which my judgment is that the act of New York is unconstitutional and void. In this opinion I have the consolation to know that I had the entire concurrence, upon the same grounds, of that great constitutional jurist, the late Mr. Chief Justice Marshall. Having heard the former arguments, his deliberate opinion was that the act of New York was unconstitutional, and that the present case fell directly within the principles established in the case of *Gibbons v. Ogden*, 9 Wheat., 1, and *Brown v. State of Maryland*, 12 Wheat., 419.

## PASSENGER CASES.

(7 Howard, 283-578. 1848.)

ERROR to the Court for the Trial of Impeachments of New York, and to the Supreme Judicial Court of Massachusetts.

SMITH v. TURNER.

Opinion by MR. JUSTICE M'LEAN.

STATEMENT OF FACTS.—Under the general denomination of health laws in New York, and by the seventh section of an act relating to the marine hospital, it is provided that "the health commissioners shall demand and be entitled to receive, and, in case of neglect or refusal to pay, shall sue for and recover, in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, namely: "1. From the master of every vessel from a foreign port, for himself and each cabin passenger, \$1.50; for each steerage passenger, mate, sailor or mariner, \$1. 2. From the master of each coasting vessel, for each person on board, \$0.25; but no coasting vessel from the states of New Jersey, Connecticut and Rhode Island shall pay for more than one voyage in each month, computing from the first voyage in each year."

The eighth section provides that the money so received shall be denominated "hospital moneys." And the ninth section gives "each master paying hospital

moneys a right to demand and recover from each person the sum paid on his account." The tenth section declares any master, who shall fail to make the above payments within twenty-four hours after the arrival of his vessel in the port, shall forfeit the sum of \$100. By the eleventh section, the commissioners of health are required to account annually to the comptroller of the state for all moneys received by them for the use of the marine hospital; "and if such money shall, in any one year, exceed the sum necessary to defray the expenses of their trust, including their own salaries, and exclusive of such expenses as are to be borne and paid as a part of the contingent charges of the city of New York, they shall pay over such surplus to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of the society."

The plaintiff in error was master of the British ship *Henry Bliss*, which vessel touched at the port of New York in the month of June, 1841, and landed two hundred and ninety steerage passengers. The defendant in error brought an action of debt on the statute against the plaintiff, to recover \$1 for each of the above passengers. A demurrer was filed, on the ground that the statute of New York was a regulation of commerce, and in conflict with the constitution of the United States. The supreme court of the state overruled the demurrer, and the court of errors affirmed the judgment. This brings before this court, under the twenty-fifth section of the judiciary act, the constitutionality of the New York statute.

I will consider the case under two general heads: 1. Is the power of congress to regulate commerce an exclusive power? 2. Is the statute of New York a regulation of commerce?

In the eighth section of the first article of the constitution it is declared that congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Before the adoption of the constitution, the states, respectively, exercised sovereign power, under no other limitations than those contained in the articles of confederation. By the third section of the sixth article of that instrument, it was declared that "no state shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in congress assembled;" and this was the only commercial restriction on state power. As might have been expected, this independent legislation, being influenced by local interests and policy, became conflicting and hostile, insomuch that a change of the system was necessary to preserve the fruits of the Revolution. This led to the adoption of the federal constitution.

§ 1284. *The federal government has no power except such as is delegated to it, either expressly or by necessary implication.*

It is admitted that, in regard to the commercial, as to other powers, the states cannot be held to have parted with any of the attributes of sovereignty which are not plainly vested in the federal government and inhibited to the states, either expressly or by necessary implication. This implication may arise from the nature of the power. In the same section which gives the commercial power to congress is given power "to borrow money on the credit of the United States," "to establish a uniform rule of naturalization," "to coin money," "to establish postoffices and post-roads," "to constitute tribunals inferior to the supreme court," "to define and punish piracies and felonies committed on the high seas," "to declare war," "to provide and maintain a navy," etc., and "to make all laws which shall be necessary and proper for carrying into

execution the foregoing powers." Only one of these powers is, in the constitution, expressly inhibited to the states; and yet, from the nature of the other powers, they are equally beyond state jurisdiction.

§ 1285. *The power to regulate commerce considered.*

In the case of *Holmes v. Jennison*, 14 Pet., 570, the chief justice, in giving his own and the opinion of three of his brethren, says: "All the powers which relate to our foreign intercourse are confided to the general government. Congress have the power to regulate commerce, to define and punish piracies," etc. "Where an authority is granted to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant, there the authority to the federal government is necessarily exclusive, and the same power cannot be constitutionally exercised by the states." P. 574. In *Houston v. Moore*, 5 Wheat., 23 (§§ 161–190, *supra*), the court say: "We are altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with one another." The court, again, in treating of the commercial power, say, in *Gibbons v. Ogden*, 9 Wheat., 196 (§§ 1183–1201, *supra*): "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." "The sovereignty of congress, though limited to specified objects, is plenary as to those objects." "The power over commerce with foreign nations and among the several states is vested in congress as absolutely as it would be in a single government having in its constitution the same restrictions," etc. And in the same case, p. 199: "Where, then, each government exercises the power of taxation, neither is exercising the power of the other; but when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do." And Mr. Justice Johnson, who gave a separate opinion in the same case, observes: "The power to regulate commerce here meant to be granted was the power to regulate commerce which previously existed in the states." And again: "The power to regulate commerce is necessarily exclusive."

In *Brown v. State of Maryland*, 12 Wheat., 446 (§§ 1466–70, *infra*), the court say: "It is not, therefore, matter of surprise that the grant of commercial power should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states." This question, they remark, "was considered in the case of *Gibbons v. Ogden*, in which it was declared to be complete in itself, and to acknowledge no limitations," etc. And Mr. Justice Baldwin, in the case of *Groves v. Slaughter*, 15 Pet., 511, says: "That the power of congress to regulate commerce among the several states is exclusive of any interference by the states, has been, in my opinion, conclusively settled by the solemn opinions of this court," in the two cases above cited. And he observes: "If these decisions are not to be taken as the established construction of this clause of the constitution, I know of none which are not yet open to doubt."

Mr. Justice Story, in the case of *City of New York v. Miln*, 11 Pet., 158 (§§ 1274–83, *supra*), in speaking of the doctrine of concurrent power in the states to regulate commerce, says that, in the case of *Gibbons v. Ogden*, "it was deliberately examined and deemed inadmissible by the court." "Mr.

Chief Justice Marshall, with his accustomed accuracy and fullness of illustration, reviewed, at that time, the whole grounds of the controversy; and from that time to the present, the question has been considered, so far as I know, at rest. The power given to congress to regulate commerce with foreign nations and among the states has been deemed exclusive, from the nature and objects of the power, and the necessary implications growing out of its exercise."

When the commercial power was under discussion in the convention which formed the constitution, Mr. Madison observed that "he was more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority." Mr. Sherman said: "The power of the United States to regulate trade, being supreme, can control interferences of the state regulations when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction." Mr. Langdon "insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the states ought to have nothing to do with it." And the motion was carried, "that no state shall lay any duty on tonnage without the consent of congress." 3 Madison Papers, 1585, 1586.

The adoption of the above provision in the constitution, and also the one in the same section: "That no state shall, without the assent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress," — is a restriction, it is contended, upon the acknowledged power of the states. The force of this argument was admitted by the court in the case of *Gibbons v. Ogden*, 9 Wheat., 1, and it was answered by the allegation that the restriction operated on the taxing power of the states. The same argument was used in the thirty-second number of the *Federalist*. I yield more to the authority of this position than to the stringency of the argument in support of it. To prohibit the exercise of a power by a state, as a general rule, admits the existence of such power. But this may not be universally true. Had there been no inhibition on the states as to "coining money and fixing the value thereof," or as to tonnage duties, it could not have been successfully contended that the states might exercise those powers. All duties are required to be uniform, and this could not be the result of state action. And the power to coin money and regulate its value, for the Union, is equally beyond the power of a state. Doubts may exist as to the true construction of an instrument in the minds of its framers, and to obviate those doubts, additional, if not unnecessary, provisions may be inserted. This remark applies to the constitution in the instances named, and in others. A concurrent power in the states to regulate commerce is an anomaly not found in the constitution. If such power exist, it may be exercised independently of the federal authority.

§ 1286. *A state law need not always yield to federal laws when they conflict.*

It does not follow, as is often said, with little accuracy, that, when a state law shall conflict with an act of congress, the former must yield. On the contrary, except in certain cases named in the federal constitution, this is never correct when the act of the state is strictly within its powers. I am aware this court have held that a state may pass a bankrupt law, which is annulled when congress shall act on the same subject. In *Sturges v. Crowninshield*, 4 Wheat., 122 (§§ 1937-39, *infra*), the court say: "Wherever the terms in which a power

is granted by the constitution to congress, or wherever the nature of the power itself requires that it shall be exclusively exercised by congress, the subject is as completely taken away from state legislatures as if they had been forbidden to act upon it." But they say: "The power granted to congress of establishing uniform laws on the subject of bankruptcy is not of this description."

§ 1287. *Willson v. The Blackbird, etc., Co.*, 2 Pet., 250, considered.

The case of *Willson v. Blackbird Creek Marsh Co.*, 2 Pet., 250 (§§ 1174-76, *supra*), it is contended, recognizes the right of a state to exercise a commercial power, where no conflict is produced with an act of congress. It must be admitted that the language of the eminent chief justice who wrote the opinion is less guarded than his opinions generally were on constitutional questions. A company was incorporated and authorized to construct a dam over Blackbird creek, in the state of Delaware, below where the tide ebbed and flowed, in order to drain the marsh, and by that means improve the health of the neighborhood. The plaintiffs, being desirous of ascending the creek with their vessel above the dam, removed a part of it as an obstruction, for which the company recovered damages. The chief justice, in speaking of the structure of the dam, the drainage of the marsh, and the improvement of the health of the neighborhood, says: "Means calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance." And he observes: "If congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows," etc., "we should feel not much difficulty in saying that a state law, coming in conflict with such act, would be void. But congress had passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several states — a power which has not been so exercised as to affect the question."

The language of the chief justice must be construed in reference to the question before the court. To suppose that he intended to lay down the general proposition that a state might pass any act to obstruct or regulate commerce which did not come in conflict with an act of congress, would not only be unauthorized by the language used, and the facts of the case before the court, but it would contradict the language of the court in *Gibbons v. Ogden*, *Brown v. Maryland*, and every case in which the commercial power has been considered. The chief justice was speaking of a creek which falls into the Delaware, and admitted in the pleadings to be navigable, but of so limited an extent that it might well be doubted whether the general regulation of commerce could apply to it. Hundreds of creeks within the flow of the tide were similarly situated. In such cases, involving doubt whether the jurisdiction may not be exclusively exercised by the state, it is politic and proper in the judicial power to follow the action of congress. Over the navigable waters of a state congress can exercise no commercial power, except as regards an intercourse with other states of the Union or foreign countries. And doubtless there are many creeks made navigable by the flowing of the tide, or by the backwater from large

rivers, which the general phraseology of an act to regulate commerce may not embrace. In all such cases, and many others that may be found to exist, the court could not safely exercise a jurisdiction not expressly sanctioned by congress. When the language of the court is applied to the facts of the above case, no such general principle as contended for is sanctioned. The construction of the dam was complained of, not as a regulation of commerce, but an obstruction of it; and the court held that, as congress had not assumed to control state legislation over those small navigable creeks into which the tide flows, the judicial power could not do so. The act of the state was an internal and a police power to guard the health of its citizens. By the erection of the dam, commerce could only be affected, as charged, consequentially and contingently. The state neither assumed nor exercised a commercial power. In this whole case, nothing more is found than a forbearance to exercise power over a doubtful object, which should ever characterize the judicial branch of the government.

§ 1288. *The nature of concurrent powers.*

A concurrent power excludes the idea of a dependent power. The general government and a state exercise concurrent powers in taxing the people of the state. The objects of taxation may be the same, but the motives and policy of the tax are different, and the powers are distinct and independent. A concurrent power in two distinct sovereignties, to regulate the same thing, is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility. A joint action is not supposed, and two independent wills cannot do the same thing. The action of one, unless there be an arrangement, must necessarily precede the action of the other; and that which is first, being competent, must establish the rule. If the powers be equal, as must be the case, both being sovereign, one may undo what the other does, and this must be the result of their action.

§ 1289. *Whether the states ever have a concurrent power to regulate commerce.*

But the argument is, that a state acting in a subordinate capacity, wholly inconsistent with its sovereignty, may regulate foreign commerce until congress shall act on the same subject, and that the state must then yield to the paramount authority. A jealousy of the federal powers has often been expressed, and an apprehension entertained that they would impair the sovereignty of the states. But this argument degrades the states by making their legislation, to the extent stated, subject to the will of congress. State powers do not rest upon this basis. Congress can in no respect restrict or enlarge state powers, though they may adopt a state law. State powers are at all times, and under all circumstances, exercised independently of the general government, and are never declared void or inoperative except when they transcend state jurisdiction. And, on the same principle, the federal authority is void when exercised beyond its constitutional limits.

The organization of the militia by a state, and also a state bankrupt law, may be superseded by the action of congress. But this is not within the above principle. The action of the state is local, and may be necessary on both subjects, and that of congress is general. In neither case is the same power exercised. No one doubts the power of a state to regulate its internal commerce. It has been well remarked that the regulation of commerce consists as much in negative as in positive action. There is not a federal power which has been exerted in all its diversified means of operation. And yet it may have been

exercised by congress, influenced by a judicious policy and the instruction of the people. Is a commercial regulation open to state action because the federal power has not been exhausted? No ingenuity can provide for every contingency; and if it could, it might not be wise to do so. Shall free goods be taxed by a state because congress have not taxed them? Or shall a state increase the duty, on the ground that it is too low? Shall passengers, admitted by act of congress without a tax, be taxed by a state? The supposition of such a power in a state is utterly inconsistent with a commercial power, either paramount or exclusive in congress. That it is inconsistent with the exclusive power will be admitted; but the exercise of a subordinate commercial power by a state is contended for. When this power is exercised, how can it be known that the identical thing has not been duly considered by congress? And how can congress, by any legislation, prevent this interference? A practical enforcement of this system, if system it may be called, would overthrow the federal commercial power.

§ 1290. *Congress has exclusive power to regulate commerce with foreign nations and among the several states.*

Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of this court in the case of *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *supra*), reiterated in *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*), and often reasserted by Mr. Justice Story, who participated in those decisions, I am brought to the conclusion that the power "to regulate commerce with foreign nations, and among the several states," by the constitution, is exclusively vested in congress.

§ 1291. *All commercial action within state limits is exclusively under state regulation.*

I come now to inquire, under the second general proposition, Is the statute of New York a regulation of foreign commerce? All commercial action within the limits of a state, and which does not extend to any other state or foreign country, is exclusively under state regulation. Congress have no more power to control this than a state has to regulate commerce "with foreign nations and among the several states." And yet congress may tax the property within a state, of every description, owned by its citizens, on the basis provided in the constitution, the same as a state may tax it. But if congress should impose a tonnage duty on vessels which ply between ports within the same state, or require such vessels to take out a license, or impose a tax on persons transported in them, the act would be unconstitutional and void. But foreign commerce, and commerce among the several states, the regulation of which, with certain constitutional exceptions, is exclusively vested in congress, no state can regulate.

§ 1292. *The police powers are retained by the states.*

In giving the commercial power to congress, the states did not part with that power of self-preservation which must be inherent in every organized community. They may guard against the introduction of anything which may corrupt the morals, or endanger the health or lives, of their citizens. Quarantine or health laws have been passed by the states, and regulations of police for their protection and welfare. The inspection laws of a state apply chiefly to exports, and the state may lay duties and imposts on imports or exports, to pay the expense of executing those laws. But a state is limited to what shall be "absolutely necessary" for that purpose. And still further to guard against the abuse of this power, it is declared that "the net produce of all duties and imposts laid by a state on imports or exports shall be for the use of the treas-



ury of the United States; and all such laws shall be subject to the revision and control of congress." The cautious manner in which the exercise of this commercial power by a state is guarded shows an extreme jealousy of it by the convention; and no doubt the hostile regulations of commerce by the states, under the confederation, had induced this jealousy. No one can read this provision, and the one which follows it in relation to tonnage duties, without being convinced that they cover, and were intended to cover, the entire subject of foreign commerce. A criticism on the term import, by which to limit the obvious meaning of this paragraph, is scarcely admissible in construing so grave an instrument.

§ 1293. "*Commerce*" defined.

Commerce is defined to be "an exchange of commodities." But this definition does not convey the full meaning of the term. It includes "navigation and intercourse." That the transportation of passengers is a part of commerce is not now an open question. In *Gibbons v. Ogden* this court say: "No clear distinction is perceived between the powers to regulate vessels in transporting men for hire, and property for hire." The provision of the constitution, that "the migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by congress prior to the year 1808," is a restriction on the general power of congress to regulate commerce. In reference to this clause, this court say, in the above case: "This section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men who pass from place to place voluntarily, and to those who pass involuntarily."

To encourage foreign emigration was a cherished policy of this country at the time the constitution was adopted. As a branch of commerce, the transportation of passengers has always given a profitable employment to our ships, and, within a few years past, has required an amount of tonnage nearly equal to that of imported merchandise. Is this great branch of our commerce left open to state regulation on the ground that the prohibition refers to an import, and a man is not an import? Pilot laws, enacted by the different states, have been referred to as commercial regulations. That these laws do regulate commerce, to a certain extent, is admitted; but from what authority do they derive their force? Certainly, not from the states. By the fourth section of the act of the 7th of August, 1789 (1 Stats. at Large, 54), it is provided: "That all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the states respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress." These state laws, by adoption, are the laws of congress, and, as such, effect is given to them. So the laws of the states which regulate the practice of their courts are adopted by congress to regulate the practice of the federal courts. But these laws, so far as they are adopted, are as much the laws of the United States, and it has often been so held, as if they had been specially enacted by congress. A repeal of them by the state, unless future changes in the acts be also adopted, does not affect their force in regard to federal action.

In the above instances, it has been deemed proper for congress to legislate, by adopting the law of the states. And it is not doubted that this has been found convenient to the public service. Pilot laws were in force in every commercial state on the seaboard when the constitution was adopted; and on the

introduction of a new system, it was prudent to preserve, as far as practicable, the modes of proceeding with which the people of the different states were familiar. In regard to pilots, it was not essential that the laws should be uniform,—their duties could be best regulated by an authority acquainted with the local circumstances under which they were performed; and the fact that the same system is continued, shows that the public interest has required no change. No one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union, and the municipal power of a state. Numerous cases have arisen, involving these powers, which have been decided, but a rule has necessarily been observed as applicable to the circumstances of each case. And so must every case be adjudged.

§ 1294. *Indirect powers of a state to interfere with commerce.*

A state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens. A state may tax the stages in which the mail is transported; but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce. And yet, in both instances, the tax on the property in some degree affects its use. An inquiry is made whether congress, under "the power to regulate commerce among the several states," can impose a tax for the use of canals, railroads, turnpike roads and bridges, constructed by a state, or its citizens? I answer that congress has no such power. The United States cannot use any one of these works without paying the customary tolls. The tolls are imposed, not as a tax, in the ordinary sense of that term, but as compensation for the increased facility afforded by the improvement.

The act of New York now under consideration is called a health law. It imposes a tax on the master and every cabin passenger of a vessel from a foreign port, of \$1.50; and of \$1 on the mate, each steerage passenger, sailor or mariner. And the master is made responsible for the tax, he having a right to exact it of the others. The funds so collected are denominated hospital moneys, and are applied to the use of the marine hospital; the surplus to be paid to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of that society. To call this a health law would seem to be a misapplication of the term. It is difficult to perceive how a health law can be extended to the reformation of juvenile offenders. On the same principle, it may be made to embrace all offenders, so as to pay the expenses incident to an administration of the criminal law. And with the same propriety, it may include the expenditures of any branch of the civil administration of the city of New York, or of the state. In fact, I can see no principle on which the fund can be limited, if it may be used as authorized by the act. The amount of the tax is as much within the discretion of the legislature of New York as the objects to which it may be applied. It is insisted that if the act, as regards the hospital fund, be within the power of the state, the application of a part of the fund to other objects, as provided in the act, cannot make it unconstitutional. This argument is unsustainable. If the state has power to impose a tax to defray the necessary expenses of a health regulation, and this power being exerted, can the tax be increased so as to defray the expenses of the state government? This is within the principle asserted.

The case of *City of New York v. Mdn*, 11 Pet., 102 (§§ 1274–83, *supra*), is relied on with great confidence as sustaining the act in question. As I assented to the points ruled in that case, consistency, unless convinced of having erred,

will compel me to support the law now before us, if it be the same in principle. The law in *Miln's Case* required that "the master or commander of any ship or other vessel arriving at the port of New York shall, within twenty-four hours after his arrival, make a report, in writing, on oath or affirmation, to the mayor of the city of New York, of the name, place of birth and last legal settlement, age and occupation of every person brought as a passenger; and of all persons permitted to land at any place during the voyage, or go on board of some other vessel, with the intention of proceeding to said city, under the penalty on such master or commander, and the owner or owners, consignee or consignees, of such ship or vessel, severally and respectively, of \$75 for each individual not so reported." And the suit was brought against *Miln*, as consignee of the ship *Emily*, for the failure of the master to make report of the passengers on board of his vessel. In their opinion this court say: "The law operated on the territory of New York, over which that state possesses an acknowledged and undisputed jurisdiction for every purpose of internal regulation;" and "on persons whose rights and duties are rightfully prescribed and controlled by the laws of the respective states within whose territorial limits they are found." This law was considered as an internal police regulation, and as not interfering with commerce. A duty was not laid upon the vessel or the passengers, but the report only was required from the master, as above stated. Now, every state has an unquestionable right to require a register of the names of the persons who come within it to reside temporarily or permanently. This was a precautionary measure to ascertain the rights of the individuals, and the obligations of the public, under any contingency which might occur. It opposed no obstruction to commerce, imposed no tax nor delay, but acted upon the master, owner or consignee of the vessel, after the termination of the voyage, and when he was within the territory of the state, mingling with its citizens, and subject to its laws.

But the health law, as it is called, under consideration, is altogether different in its objects and means. It imposes a tax or duty on the passengers, officers and sailors, holding the master responsible for the amount at the immediate termination of the voyage, and, necessarily, before the passengers have set their feet on land. The tax on each passenger, in the discretion of the legislature, might have been \$5 or \$10, or any other sum, amounting even to a prohibition of the transportation of passengers; and the professed object of the tax is as well for the benefit of juvenile offenders as for the marine hospital. And it is not denied that a considerable sum thus received has been applied to the former object. The amount and application of this tax are only important to show the consequences of the exercise of this power by the states. The principle involved is vital to the commercial power of the Union.

The transportation of passengers is regulated by congress. More than two passengers for every five tons of the ship or vessel are prohibited, under certain penalties; and the master is required to report to the collector a list of the passengers from a foreign port, stating the age, sex and occupation of each, and the place of their destination. In England the same subject is regulated by act of parliament, and the same thing is done, it is believed, in all commercial countries. If the transportation of passengers be a branch of commerce, of which there can be no doubt, it follows that the act of New York, in imposing this tax, is a regulation of commerce. It is a tax upon a commercial operation,—upon what may, in effect, be called an import. In a commercial sense, no just distinction can be made, as regards the law in question, between

the transportation of merchandise and passengers. For the transportation of both the ship-owner realizes a profit, and each is the subject of a commercial regulation by congress. When the merchandise is taken from the ship, and becomes mingled with the property of the people of the state, like other property, it is subject to the local law; but until this shall take place, the merchandise is an import, and is not subject to the taxing power of the state; and the same rule applies to passengers. When they leave the ship and mingle with the citizens of the state, they become subject to its laws.

In *Gibbons v. Ogden* the court held that the act of laying "duties or imposts on imports or exports" is derived from the taxing power; and they lay much stress on the fact that this power is given in the same sentence as the power to "lay and collect taxes." "The power," they say, "to regulate commerce is given" in a separate clause, "as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred;" and they remark that, had not the states been prohibited, they might, under the power to tax, have levied "duties on imports or exports." 9 Wheat., 201.

The constitution requires that all "duties and imposts shall be uniform," and declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." Now, it is inexplicable to me how thirteen or more independent states could tax imports under these provisions of the constitution. The tax must be uniform throughout the Union; consequently the exercise of the power by any one state would be unconstitutional, as it would destroy the uniformity of the tax. To secure this uniformity was one of the motives which led to the adoption of the constitution. The want of it produced collisions in the commercial regulations of the states. But if, as is contended, these provisions of the constitution operate only on the federal government, and the states are free to regulate commerce by taxing its operations in all cases where they are not expressly prohibited, the constitution has failed to accomplish the great object of those who adopted it. These provisions impose restrictions on the exercise of the commercial power, which was exclusively vested in congress; and it is as binding on the states as any other exclusive power with which it is classed in the constitution.

It is immaterial under what power duties on imports are imposed. That they are the principal means by which commerce is regulated, no one can question. Whether duties shall be imposed with the view to protect our manufactures, or for purposes of revenue only, has always been a leading subject of discussion in congress; and also what foreign articles may be admitted free of duty. The force of the argument, that things untouched by the regulating power have been equally considered with those of the same class on which it has operated, is not admitted by the counsel for the defendant. But does not all experience sustain the argument? A large amount of foreign articles brought into this country for several years have been admitted free of duty. Have not these articles been considered by congress? The discussion in both houses of congress, the report by the committees of both, and the laws that have been enacted, show that they have been duly considered.

§ 1295. *Except to guard its citizens against diseases and paupers, the municipal power of a state cannot prohibit the immigration of foreigners.*

Except to guard its citizens against diseases and paupers, the municipal power of a state cannot prohibit the introduction of foreigners brought to this country under the authority of congress. It may deny to them a residence, unless they shall give security to indemnify the public should they become paupers.

The slave states have the power, as this court held in *Groves v. Slaughter*, to prohibit slaves from being brought into them as merchandise. But this was on the ground that such a prohibition did not come within the power of congress "to regulate commerce among the several states." It is suggested that, under this view of the commercial power, slaves may be introduced into the free states. Does any one suppose that congress can ever revive the slave-trade? And if this were possible, slaves thus introduced would be free.

As early as May 27, 1796 (1 Stats. at Large, 474), congress enacted that "the president be authorized to direct the revenue officers commanding forts and revenue cutters to aid in the execution of quarantine, and also in the execution of the health laws of the states respectively." And by the act of February 25, 1799 (1 id., 619), which repealed the above act, more enlarged provisions were enacted, requiring the revenue officers of the United States to conform to and aid in the execution of the quarantine and health laws of the states. In the first section of this law there is a proviso that "nothing therein shall enable any state to collect a duty of tonnage or impost without the consent of congress." A proviso limits the provisions of the act into which it is introduced. But this proviso may be considered as not restricted to this purpose. It shows with what caution congress guarded the commercial power, and it is an authoritative provision against its exercise by the states. An impost, in its enlarged sense, means any tax or tribute imposed by authority, and applies as well to a tax on persons as to a tax on merchandise. In this sense it was no doubt used in the above act. Any other construction would be an imputation on the intelligence of congress. If this power to tax passengers from a foreign country belongs to a state, a tax, on the same principle, may be imposed on all persons coming into or passing through it from any other state of the Union. And the New York statute does in fact lay a tax on passengers on board of any coasting-vessel which arrives at the port of New York, with an exception of passengers in vessels from New Jersey, Connecticut and Rhode Island, who are required to pay for one trip in each month. All other passengers pay the tax every trip. If this may be done in New York, every other state may do the same on all the lines of our internal navigation. Passengers on a steamboat which plies on the Ohio, the Mississippi, or on any of our other rivers, or on the lakes, may be required to pay a tax, imposed at the discretion of each state within which the boat shall touch. And the same principle will sustain a right in every state to tax all persons who shall pass through its territory on railroad cars, canal boats, stages, or in any other manner. This would enable a state to establish and enforce a non-intercourse with every other state.

The ninth section of the first article of the constitution declares: "Nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another." But if the commercial power of the Union over foreign commerce does not exempt passengers brought into the country from state taxation, they can claim no exemption under the exercise of the same power among the states. In *McCulloch v. State of Maryland*, 4 Wheat., 431 (§§ 380-393, *supra*), this court say: "That there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, is a proposition not to be denied."

The officers and crew of the vessel are as much the instruments of commerce as the ship, and yet they are taxed under this health law of New York as such instruments. The passengers are taxed as passengers, being the subjects of

commerce from a foreign country. By the fourteenth article of the treaty of 1794 (8 Stats. at Large, 116), with England, it is stipulated that the people of each country may freely come, with their ships and cargoes, to the other, subject only to the laws and statutes of the two countries respectively. The statutes here referred to are those of the federal government, and not of the states. The general government only is known in our foreign intercourse.

By the forty-sixth section of the act of March, 1799 (1 id., 661), the wearing apparel and other personal baggage, and the tools or implements of a mechanical trade, from a foreign port, are admitted free of duty. These provisions of the treaty and of the act are still in force, and they have a strong bearing on this subject. They are, in effect, repugnant to the act of New York.

It is not doubted that a large portion, perhaps nine-tenths, of the foreign passengers landed at the port of New York pass through the state to other places of residence. At such places, therefore, pauperism must be increased much more by the influx of foreigners than in the city of New York. If, by reason of commerce, a burden is thrown upon our commercial cities, congress should make suitable provisions for their relief. And I have no doubt this will be done. The police power of the state cannot draw within its jurisdiction objects which lie beyond it. It meets the commercial power of the Union in dealing with subjects under the protection of that power, yet it can only be exerted under peculiar emergencies, and to a limited extent. In guarding the safety, the health and morals of its citizens, a state is restricted to appropriate and constitutional means: If extraordinary expense be incurred, an equitable claim to an indemnity can give no power to a state to tax objects not subject to its jurisdiction. The attorney-general of New York admitted that if the commercial power were exclusively vested in congress, no part of it can be exercised by a state. The soundness of this conclusion is not only sustainable by the decisions of this court, but by every approved rule of construction. That the power is exclusive seems to be as fully established as any other power under the constitution which has been controverted.

A tax or duty upon tonnage, merchandise or passengers is a regulation of commerce, and cannot be laid by a state, except under the sanction of congress and for the purposes specified in the constitution. On the subject of foreign commerce, including the transportation of passengers, congress have adopted such regulations as they deemed proper, taking into view our relations with other countries. And this covers the whole ground. The act of New York which imposes a tax on passengers of a ship from a foreign port, in the manner provided, is a regulation of foreign commerce, which is exclusively vested in congress; and the act is, therefore, void.

#### NORRIS v. CITY OF BOSTON

This is a writ of error, which brings before the court the judgment of the supreme court of the state of Massachusetts.

"An act relating to alien passengers," passed the 20th of April, 1837, by the legislature of Massachusetts, contains the following provisions:

"§ 1. When any vessel shall arrive at any port or harbor within this state, from any port or place without the same, with alien passengers on board, the officer or officers whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, are hereby authorized and required to appoint, shall go on board such vessels and examine into the condition of said passengers.

"§ 2. If, on such examination, there shall be found, among said passengers, any lunatic, idiot, maimed, aged or infirm person, incompetent, in the opinion of the officers so examining, to maintain themselves, or who have been paupers in any other country, no such alien passenger shall be permitted to land, until the master, owner, consignee or agent of such vessel shall have given to such city or town a bond in the sum of \$1,000, with good and sufficient security, that no such lunatic or indigent passenger shall become a city, town or state charge within ten years from the date of said bond.

"§ 3. No alien passenger, other than those spoken of in the preceding section, shall be permitted to land, until the master, owner, consignee or agent of such vessel shall pay to the regularly appointed boarding officer the sum of \$2 for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated, as the city or town may direct, for the support of foreign paupers."

The plaintiff being an inhabitant of St. John's, in the province of New Brunswick and kingdom of Great Britain, arriving in the port of Boston, from that place, in command of a schooner called the Union Jack, which had on board nineteen alien passengers, for each of which \$2 were demanded of the plaintiff, and paid by him, on protest that the exaction was illegal. An action being brought, to recover back this money, against the city of Boston, in the court of common pleas, under the instructions of the court, the jury found a verdict for the defendant, on which judgment was entered, and which was affirmed on a writ of error to the supreme court.

§ 1296. *A state may deny to foreigners a residence unless they give security to indemnify the public should they become paupers, but cannot compel a master of a vessel to pay a tax for every passenger.*

Under the first and second sections of the above act, the persons appointed may go on board of a ship from a foreign port, which arrives at the port of Boston with alien passengers on board, and examine whether any of them are lunatics, idiots, maimed, aged or infirm, incompetent to maintain themselves, or have been paupers in any other country, and not permit such persons to be put on shore, unless security shall be given that they shall not become a city, town or state charge. This is the exercise of an unquestionable power in the state to protect itself from foreign paupers and other persons who would be a public charge; but the nineteen alien passengers for whom the tax was paid did not come, nor any one of them, within the second section. The tax of \$2 was paid by the master for each of these passengers before they were permitted to land. This, according to the view taken in the above case of *Smith v. Turner*, was a regulation of commerce, and not being within the power of the state, the act imposing the tax is void. The fund thus raised was no doubt faithfully applied for the support of foreign paupers, but the question is one of power, and not of policy. The judgment of the supreme court, in my opinion, should be reversed, and this cause be remanded to that court, with instructions to carry out the judgment of this court.

NORRIS v. CITY OF BOSTON and SMITH v. TURNER.

Opinion by MR. JUSTICE WAYNE.

I agree with Mr. Justice M'Lean, Mr. Justice Catron, Mr. Justice M'Kinley, and Mr. Justice Grier, that the laws of Massachusetts and New York, so far as they are in question in these cases, are unconstitutional and void. I would not say so if I had any, the least, doubt of it; for I think it obligatory upon

this court, when there is a doubt of the unconstitutionality of a law, that its judgment should be in favor of its validity. I have formed my conclusions in these cases with this admission constantly in mind.

Before stating, however, what they are, it will be well for me to say, that the four judges and myself, who concur in giving the judgment in these cases, do not differ in the grounds upon which our judgment has been formed, except in one particular, in no way at variance with our united conclusion; and that is, that a majority of us do not think it necessary in these cases to reaffirm, with our brother M'Lean, what this court has long since decided, that the constitutional power to regulate "commerce with foreign nations, and among the several states, and with the Indian tribes," is exclusively vested in congress, and that no part of it can be exercised by a state. I believe it to be so, just as it is expressed in the preceding sentence. And in the sense in which those words were used by this court in the case of *Gibbons v. Ogden*, 9 Wheat., 198 (§§ 1183-1201, *supra*). All that was decided in that case remains unchanged by any subsequent opinion or judgment of this court. Some of the judges of it have, in several cases, expressed opinions that the power to regulate commerce is not exclusively vested in congress. But they are individual opinions, without judicial authority to overrule the contrary conclusion, as it was given by this court in *Gibbons v. Ogden*. Still, I do not think it necessary to reaffirm that position in these cases, as a part of our judgments upon them. Its exclusiveness in congress will, it is true, be an unavoidable inference from some of the arguments which I shall use upon the power of congress to regulate commerce; but it will be seen that the argument, as a whole, will be a proper and apt foundation for the conclusion to which five of us have come,—that the laws of Massachusetts and New York, so far as they are resisted by the plaintiffs in the cases before us, are tax acts, in the nature of regulations acting upon the commerce of the United States, such as no state can now constitutionally pass.

For the acts of Massachusetts and New York imposing taxes upon passengers, and for the pleadings upon which these cases have been brought to this court, I refer to the opinion of Mr. Justice Catron. They are fully and accurately stated. I take pleasure in saying that I concur with him in all the points made in his opinion, and in his reasoning in support of them. They are sustained by such minute references to the legislation of congress, and to treaty stipulations, that nothing of either is left to be added. As an argument, it closes this controversy against any other view of the subject-matter, in opposition to my learned brother's conclusions. His leading positions are, that the acts of Massachusetts and New York are tax or revenue acts upon the commerce of the United States, and that commerce has been regulated by the legislation of congress and by treaty stipulations; that the power to regulate commerce, having been acted upon by congress, indicates how far the power is to be exercised for the United States as a nation, with which there can be no interference by any state legislation; that a treaty permitting the ingress of foreigners into the United States, with or without any other stipulation than a reciprocal right of ingress for our people into the territories of the nation with which the treaty may be made, prevents a state from imposing a poll-tax or personal impost upon foreigners, either directly or indirectly, for any purpose whatever, as a condition for being landed in any part of the United States, whether such foreigners shall come to it for commercial purposes, or as immigrants, or for temporary visitation.



Those of us who are united with Mr. Justice Catron in giving the judgments in these cases concur with him in those opinions. Mr. Justice M'Kinley and Mr. Justice Grier have just said so; my own concurrence has been already expressed; and the second division of Mr. Justice M'Lean's opinion contains conclusions identical with those of Mr. Justice Catron, concerning the unconstitutionality of the laws of Massachusetts and New York, on account of the conflict between them with the legislation of congress and with treaty stipulations. I also concur with Mr. Justice M'Kinley in his interpretation of the ninth section of the first article of the constitution; also with Mr. Justice Grier, in his opinion in the case of *Norris v. The City of Boston*.

§ 1297. *Points decided in this case.*

I have been more particular in speaking of the opinions of Messrs. Justices M'Lean and Catron than I would otherwise have been, and of the points of agreement between them, and of the concurrence of Messrs. Justices M'Kinley and Grier and myself in all in which both opinions agree, because a summary may be made from them of what the court means to decide in the cases before us. In my view, after a very careful perusal of those opinions, and of those also of Mr. Justice M'Kinley and Mr. Justice Grier, I think the court means now to decide:

1. That the acts of New York and Massachusetts imposing a tax upon passengers, either foreigners or citizens, coming into the ports in those states, either in foreign vessels or vessels of the United States, from foreign nations or from ports in the United States, are unconstitutional and void, being in their nature regulations of commerce contrary to the grant in the constitution to congress of the power to regulate commerce with foreign nations and among the several states.

2. That the states of this Union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws; and that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise.

3. That the acts of Massachusetts and New York in question in these cases conflict with treaty stipulations existing between the United States and Great Britain, permitting the inhabitants of the two countries "freely and securely to come, with their ships and cargoes, to all places, ports and rivers in the territories of each country to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of said territories respectively; also, to hire and occupy houses and warehouses for the purposes of their commerce, and generally the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries respectively;" and that said laws are therefore unconstitutional and void.

4. That the congress of the United States having, by sundry acts, passed at different times, admitted foreigners into the United States with their personal luggage and tools of trade, free from all duty or imposts, the acts of Massachusetts and New York, imposing any tax upon foreigners or immigrants for any purpose whatever, whilst the vessel is *in transitu* to her port of destination, though said vessel may have arrived within the jurisdictional limits of either of the states of Massachusetts and New York, and before the passengers have been landed, are in violation of said acts of congress, and therefore unconstitutional and void.

5. That the acts of Massachusetts and New York, so far as they impose any

obligation upon the owners or consignees of vessels, or upon the captains of vessels or freighters of the same, arriving in the ports of the United States within the said states, to pay any tax or duty of any kind whatever, or to be in any way responsible for the same, for passengers arriving in the United States, or coming from a port in the United States, are unconstitutional and void, being contrary to the constitutional grant to congress of the power to regulate commerce with foreign nations and among the several states, and to the legislation of congress under the said power, by which the United States have been laid off into collection districts, and ports of entry established within the same, and commercial regulations prescribed, under which vessels, their cargoes and passengers, are to be admitted into the ports of the United States, as well from abroad as from other ports of the United States. That the act of New York now in question, so far as it imposes a tax upon passengers arriving in vessels from other ports in the United States, is properly, in this case, before this court for construction, and that the said tax is unconstitutional and void. That the ninth section of the first article of the constitution includes within it the migration of other persons, as well as the importation of slaves, and in terms recognizes that other persons, as well as slaves, may be the subjects of importation and commerce.

6. That the fifth clause of the ninth section of the first article of the constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another state; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another," is a limitation upon the power of congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the states to destroy such equality by any legislation prescribing a condition upon which vessels bound from one state shall enter the ports of another state.

7. That the acts of Massachusetts and New York, so far as they impose a tax upon passengers, are unconstitutional and void, because each of them so far conflicts with the first clause of the eighth section of the first article of the constitution, which enjoins that all duties, imposts and excises shall be uniform throughout the United States; because the constitutional uniformity enjoined in respect to duties and imposts is as real and obligatory upon the states, in the absence of all legislation by congress, as if the uniformity had been made by the legislation of congress; and that such constitutional uniformity is interfered with and destroyed by any state imposing any tax upon the intercourse of persons from state to state, or from foreign countries to the United States.

8. That the power in congress to regulate commerce with foreign nations, and among the several states, includes navigation upon the high seas, and in the bays, harbors, lakes and navigable waters within the United States, and that any tax by a state in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant.

§ 1298. *A state may pass quarantine and health laws.*

9. That the states of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but

precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound; and that the states may, in the exercise of such police power, without any violation of the power in congress to regulate commerce, exact from the owner or consignee of a quarantined vessel, and from the passengers on board of her, such fees as will pay to the state the cost of their detention and of the purification of the vessel, cargo, and apparel of the persons on board.

Having done what I thought it was right to do to prevent hereafter any misapprehension of what the court now means to decide, I will give some reasons, in addition to those which have been urged by my associates, in support of our common result. In the first place, let it be understood that, in whatever I may say upon the power which congress has "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," the internal trade of a state is not meant to be included; that not being in any way within the regulating power of congress. In the consideration, too, of the power in congress to regulate commerce, I shall not rely, in the first instance, upon what may be constitutionally done in many commercial particulars, as well under the treaty-making power as by the legislation of congress. My first object is to show the plenitude of the power in congress from the grant itself, without aid from any other clause in the constitution. The treaty-making power for commercial purposes, however, and other clauses in the constitution relating to commerce, may afterwards be used to enforce and illustrate the extent and character of the power which congress has to regulate commerce. It is a grant of legislative power, susceptible, from its terms and the subject-matter, of definite and indisputable interpretation. Any mere comment upon the etymology of the words "regulate" and "commerce" would be unsatisfactory in such a discussion. But if their meaning, as they were used by the framers of the constitution, can be made precise by the subject-matter, then it cannot be doubted that it was intended by them that congress should have the legislative power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, to the exclusion of any regulation for such commerce by any one of the states.

§ 1299. *Commerce considered.*

All commerce between nations is permissive or conventional. The first includes every allowance of it, under what is termed by writers upon international law the liberty or freedom of commerce, its allowance by statutes, or by the orders of any magistracy having the power to exercise the sovereignty of a nation in respect to commerce. Conventional commerce is, of course, that which nations carry on with each other under treaty stipulations. With colonial colonies, commerce, another distinct kind, between nations and their colonies, which the laws of nations permit the former to monopolize, we have nothing to do upon this occasion.

Now, what commerce was in fact, at least so far as European nations were concerned, had been settled beyond all dispute before our separation from the mother country. It was well known to the framers of the constitution, in all its extent and variety. Hard denials of many of its privileges had taught them what it was. They were familiar with the many valuable works upon trade and international law which were written and published, and which had been circulated in England and in the colonies from the early part of the last century up to the beginning of the Revolution. It is not too much to say, that our controversies with the mother country upon the subject had given to the

statesmen in America in that day more accurate knowledge of all that concerned trade in all its branches and rights, and a more prompt use of it for any occasion, than is now known or could be used by the statesmen and jurists of our own time. Their knowledge, then, may well be invoked to measure the constitutional power of congress to regulate commerce.

Commerce between nations or among states has several branches. Martens, in his Summary of the Laws of Nations, says: "It consists in selling the superfluity; in purchasing articles of necessity, as well productions as manufactures; in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." "Generally speaking, the commerce in Europe is so far free, that no nation refuses positively and entirely to permit the subjects of another nation, when even there is no treaty between them, to trade with its possessions in or out of Europe, or to establish themselves in its territory for that purpose. A state of war forms here a natural exception. However, as long as there is no treaty existing, every state retains its natural right to lay on such commerce whatever restriction it pleases. A nation is then fully authorized to prohibit the entry or exportation of certain merchandise, to institute customs and to augment them at pleasure, to prescribe the manner in which the commerce with its dominions shall be carried on, to point out the places where it shall be carried on, or to exempt from it certain parts of its dominions, to exercise freely its sovereign power over the foreigners living in its territories, to make whatever distinctions between the nations with whom it trades it may find conducive to its interests."

In all of the foregoing particulars congress may act legislatively. It is conceded that the states may not do so in any one of them; and if, in virtue of the power to lay taxes, the United States and the states may act in that way concurrently upon foreigners when they reside in a state, it does not follow that the states may impose a personal impost upon them, as the condition of their being permitted to land in a port of the United States. "Duties on the entry of merchandise are to be paid indiscriminately by foreigners as well as subjects. Personal imposts it is customary not to exact from foreigners till they have for some time been inhabitants of the state." Martens, p. 97.

Keeping, then, in mind what commerce is, and how far a nation may legally limit her own commercial transactions with another state, we cannot be at a loss to determine, from the subject-matter of the clause in the constitution, that the meaning of the terms used in it is to exclude the states from regulating commerce in any way, except their own internal trade, and to confide its legislative regulation completely and entirely to congress. When I say completely and entirely to congress, I mean all that can be included in the term "commerce among the several states," subject, of course, to the right of the states to pass inspection laws in the mode prescribed by the constitution, to the prohibition of any duty upon exports, either from one state to another state, or to foreign countries, and to that commercial uniformity which the constitution enjoins respecting all that relates to the introduction of merchandise into the United States, and those who may bring it for sale, whether they are citizens or foreigners, and all that concerns navigation, whether vessels are employed in the transportation of passengers or freight, or both; including, also, all the regulations which the necessities and safety of navigation may require. "Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turn-

pike roads, ferries, etc., are component parts of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government."

But the conclusion derived from the subject-matter of the clause, as I have just stated it, is strengthened particularly by what may be done in respect to commerce by treaty, and by other clauses in the constitution relating to commerce. Martens, p. 151, says: "The mere general liberty of trade, such as it is acknowledged at present in Europe, being too vague to secure to a nation all the advantages it is necessary it should derive from its commerce, commercial powers have been obliged to have recourse to treaties for their mutual benefit. The number of these treaties is considerably augmented since the sixteenth century. However they may differ in their conditions, they turn generally on these three points: 1. On commerce in time of peace. 2. On the measures to be pursued with respect to commerce and commercial subjects in case of rupture between the parties. 3. On the commerce of the contracting party that may happen to remain neuter, while the other contracting party is at war with a third power. With respect to the first point the custom is: 1. To settle in general the privileges that the contracting parties grant reciprocally to their subjects. 2. To enter into the particulars of the rights to be enjoyed by their subjects, as well with respect to their property as to their personal rights. Particular care is usually taken to provide for the free enjoyment of their religion; for their right to the benefit of the laws of the country; for the security of the books of commerce, etc. 3. To mention specifically the kinds of merchandise which are to be admitted, to be imported or exported, and the advantages to be granted relatively to customs, tonnage, etc.

"With respect to the rights and immunities in case of a rupture between the parties, the great objects to be obtained are: 1. An exemption from seizure of the person or effects of the subjects residing in the territory of the other contracting power. 2. To fix the time which they shall have to remove with their property out of the territory. 3. Or to point out the conditions on which they may be permitted to remain in the enemy's country during the war. In specifying the rights of commerce to be enjoyed by the neutral power, it is particularly necessary: 1. To exempt its vessels from embargo. 2. To specify the merchandise which is to be accounted contraband of war, and to settle the penalties in case of contravention. 3. To agree on the manner in which vessels shall be searched at sea. 4. To stipulate whether neutral bottoms are to make neutral goods or not."

§ 1300. *Limitations upon the powers of the states to regulate commerce.*

It seems to me, when such regulations of commerce as may be made by treaty are considered in connection with that clause in the constitution giving to congress the power to regulate it by legislation, and also in connection with the restraints upon the states in the tenth section of the first article of the constitution, in respect to treaties and commerce, that the states have parted with all power over commerce, except the regulation of their internal trade. The restraints in that section are, that no state shall enter into any treaty, alliance or confederation; no state shall, without the consent of congress, lay any duties on imports or exports, except what may be necessary for executing its inspection laws; no state shall, without the consent of congress, lay any duty of tonnage, or enter into any agreement or compact with another state or with a foreign power.

The states, then, cannot regulate commerce by a treaty or compact, and be-

fore it can be claimed that they may do so in any way by legislation, it must be shown that the surrender which they have made to a common government to regulate commerce for the benefit of all of them has been done in terms which necessarily imply that the same power may be used by them separately, or that the power in congress to regulate commerce has been modified by some other clause in the constitution. No such modifying clause exists. The terms used do not, in their ordinary import, admit of any exception from the entireness of the power in congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. The exercise of any such power of regulation by the states, or any one or more of them, would conflict with the constitutional authority of the United States to regulate commerce by legislation and by treaty, and would measurably replace the states in their commercial attitude to each other as they stood under the articles of confederation, and not as they meant to be when "we, the people of the United States," in their separate sovereignties, as they existed under the articles of confederation, superseded the latter by their ratification of "the constitution for the United States of America." In what I have said concerning commercial regulations under the treaty-making power, I do not mean to be understood as saying that by treaty all regulation of commerce can be made, independently of legislation by congress. That question I do not enter into here, for in such cases as are now before the court I have no right to do so. It has only been alluded to by me to prevent any such inference from being made.

§ 1301. *A state act regulating commerce with foreign nations, or restraining navigation, is void.*

Apply the foregoing reasoning to the acts of Massachusetts and New York, and whatever may be the motive for such enactments or their legislative denomination, if they practically operate as regulations of commerce, or as restraints upon navigation, they are unconstitutional. When they are considered in connection with the existing legislation of congress in respect to trade and navigation, and with treaty stipulations, they are certainly found to be in conflict with the supreme law of the land. But those acts conflict also with other clauses in the constitution relating to commerce and navigation; also, with that clause which declares that duties, imposts and excises shall be uniform throughout the United States. Not in respect to excises, for those being taxes upon the consumption or retail sale of commodities, the states have a power to lay them as well as congress. Not so, however, as to duties and imposts; the first, in its ordinary taxing sense, being taxes or customs upon merchandise; and an impost being also, in its restrained sense, a duty upon imported goods, but also, in its more enlarged meaning, any tax or imposition upon persons. Notwithstanding what may have otherwise been said, I was brought to the conclusion, in my consideration of the taxing power of congress, before these cases were before us, that there was no substantial reason for supposing it was used by the framers of the constitution exclusively in its more confined sense.

§ 1302. *Giving preference to the ports of one state over those of another.*

But I return to those clauses with which I have said the acts in question conflict. It will be conceded by all that the fifth clause of the ninth section of the first article of the constitution, declaring that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another," was intended to establish among them a perfect equality in commerce and navigation. That all should be alike, in respect to commerce and navigation, is an enjoined constitutional equality, which can neither be inter-

rupted by congress nor by the states. When congress enacts regulations of commerce or revenue, it does so for the United States, and the equality exists. When a state passes a law in any way acting upon commerce, or one of revenue, it can only do so for itself, and the equality is destroyed. In such a case the constitution would be violated, both in spirit and in letter.

§ 1303. *Uniformity of duties, etc., throughout the Union.*

Again, it is declared in the first clause of the eighth section of the first article of the constitution, that all duties, imposts and excises shall be uniform throughout the United States; that is, first, that when congress lays duties, imposts or excises, they shall be uniform; and secondly, that if, in the exercise of the taxing power, congress shall not lay duties or imposts upon persons and particular things imported, the states shall not destroy the uniformity in the absence of regulation by taxing either. Things imported, it is admitted, the states cannot tax, whether congress has made them dutiable articles or free goods; but persons, it is said, they can, because a state's right to tax is only restrained in respect to imports and exports, and, as a person is not an import, a tax or duty may be laid upon him as the condition of his admission into the state.

§ 1304. *Limitations upon the taxing power of the states.*

But this is not a correct or full view of the point. A state's right to tax may only be limited to the extent mentioned; but that does not give the state the right to tax a foreigner or person for coming into one of the states of the United States. That would be a tax or revenue act, in the nature of a regulation of commerce, acting upon navigation. It is not a disputable point, that, under the power given to congress to lay and collect taxes, duties, imposts and excises, it may, in the exercise of its power to regulate commerce, tax persons as well as things, as the condition of their admission into the United States. To lay and collect taxes, duties and imposts, gives to congress a plenary power over all persons and things for taxation, except exports. Such is the received meaning of the word taxes in its most extended sense, and always so when it is not used in contradistinction to terms of taxation, having a limited meaning as to the objects to which, by usage, the terms apply. It is in the constitution used in both senses. In its extended sense, when it is said that congress may lay and collect taxes; and in a more confined sense, in contradistinction to duties, imposts and excises.

The power, then, to tax, and the power to regulate commerce, give to congress the right to tax persons who may come into the United States, as a regulation of commerce and navigation. I have already mentioned, among the restraints which nations may impose upon the liberty or freedom of commerce, those which may be put upon foreigners coming into or residing within their territories. This right exists to its fullest extent, as a portion of the commercial rights of nations, when not limited by treaties. The power to regulate commerce with foreign nations, and among the several states, having been given to congress, congress may, but the states cannot, tax persons for coming into the United States. It is urged, however, in reply to what has just been said, that as the power to regulate commerce and the right to levy taxes are distinct and substantive powers, the first cannot be used to limit the right of the states to tax, beyond the prohibition upon them not to tax exports or imports. The proposition is rightly stated, but what is gained in these cases from it? Nothing. The sums directed to be paid by or for passengers are said to be taxes which the states have a right to impose, in virtue of their police powers, either to prevent the evils of pauperism or to protect their inhabitants from

apprehended disease. But the question in these cases is, not whether the states may or may not tax, but whether they can levy a tax upon passengers coming into the United States under the authority and sanction of the laws of congress and treaty stipulations.

§ 1305. *The right of a state to tax persons and property does not occur until they come or are brought within its territory.*

The right in a nation or state occurs — not in all cases, for there are international exceptions — upon all persons and things when they come or are brought within the territory of a state. Not, however, because the person or thing is within the territory, but because they are under the sovereignty or political jurisdiction of the state. If not within the latter, the right to tax does not arise until that event occurs. States may have territorial jurisdiction for most of the purposes of sovereignty, without political jurisdiction for some of them. The distinction is not mine. It has been long since made by jurists and writers upon national law, because the history of nations, from an early antiquity until now, shows such relations between them. The framers of the constitution acted upon it throughout, in all the sovereign powers which they proposed that the states should yield to the United States. Martens properly says, that, to have a just idea of the states of which Europe is composed, we must distinguish those which are absolutely sovereign from those which are but demi-sovereign. The states of the German empire, for instance, and the Italian princes who acknowledge their submission to the empire, and the German states, in their present diet for great national purposes, with a vicar at its head, overtopping in might and majesty, but with regulated power, all before who have been emperors of Germany. I do not mean to say that the states of this Union are demi-sovereign to the general government in the sense in which some of the nations in Europe are to other nations; but that such connection between those nations furnishes the proof of the distinction between territorial sovereignty and political sovereignty. The sovereignty of these states and that of the United States, in all constitutional particulars, have a different origin. But I do mean to say, that the distinction between territorial and political jurisdiction arises, whether the association be voluntary between states or otherwise. Whenever one power has an extraterritorial right over the territory or sovereignty of another power, it is called by writers “a partial right of sovereignty.” Is not that exactly the case between the United States, as a nation, and the states? Do not the constitutional powers of the United States act upon the territory, as well as upon the sovereignty of the states, to the extent of what was their sovereignty before they yielded it to the United States? Can any one of the sovereign powers of the United States be carried out by legislation, without acting upon the territory and sovereignty of the states? This being so, congress may say, and does say, whence a voyage may begin to the United States, and where it may end in a state of the United States. Though in its transit it enters the territory of a state, the political jurisdiction of the state cannot interfere with it by taxation in any way until the voyage has ended; not until the persons who may be brought as passengers have been landed, or the goods which may have been entered as merchandise have passed from the hands of the importer, or have been made by himself a portion of the mass of the general property of the state. It is upon this distinction between territorial and political jurisdiction that the case of *Brown v. Maryland*, 12 Wheat., 419 (§§ 1466–70, *infra*), rests. Without it, it has no other foundation, although it is not so expressed in the opinion of the court.



**§ 1306.** *What is meant by "police power" of a state.*

In these cases the laws complained of meet the vessels when they have arrived in the harbor on the way to the port to which they are bound, before the passengers have been landed. And before they are landed, they are met by superadded conditions in the shape of a tax, with which it is said they must comply, or which the captain must pay for them, before they are permitted to land. Certainly, it is not within the political jurisdiction of a state, in such circumstances of a voyage, to tax passengers. But it is said, notwithstanding, that the tax may be laid in virtue of police power in the states, never surrendered by them to the United States. A proper understanding of the police power of a nation will probably remove the objection from the minds of those who made it. What is the supreme police power of a state? It is one of the different means used by sovereignty to accomplish that great object, the good of the state. It is either national or municipal, in the confined application of that word to corporations and cities. It was used in the argument invariably in its national sense. In that sense it comprehends the restraint which nations may put upon the liberty of entry and passage of persons into different countries, for the purposes of visitation or commerce.

**§ 1307.** *Nations have the right to know the character of every foreigner that arrives in their ports.*

The first restraint that nations reserve to themselves is the right to be informed of the name and quality of every foreigner that arrives. That, and no more than that, was *Miln's Case*, 11 Pet., 102 (§§ 1274-83, *supra*). Nations have a right to keep at a distance all suspected persons; to forbid the entry of foreigners or foreign merchandise of a certain description, as circumstances may require. In a word, it extends to every person and every thing in the territory; and foreigners are subject to it, as well as subjects to the state, except only ministers and other diplomatic functionaries; and they are bound to observe municipal police, though not liable to its penalties. "The care of hindering what might trouble the internal tranquillity and security of the state is the basis of the police, and authorizes the sovereign to make laws and establish institutions for that purpose; and as every foreigner living in the state ought to concur in promoting the object, even those who enjoy the right extritorially (such as sovereigns and ministers) cannot dispense with observing the laws of police, although in case of transgression they cannot be punished like native or temporary subjects of the state."

**§ 1308.** *Police powers, how far reserved to the states.*

Police powers, then, and sovereign powers, are the same, the former being considered so many particular rights under that name or word collectively placed in the hands of the sovereign. Certainly, the states of this Union have not retained them to the extent of the preceding enumeration. How much of it have the states retained? I answer, unhesitatingly, all necessary to their internal government. Generally, all not delegated by them in the articles of confederation to the United States of America; all not yielded by them under the constitution of the United States. Among them, qualified rights to protect their inhabitants by quarantine from disease; imperfect and qualified, because the commercial power which congress has is necessarily connected with quarantine. And congress may by adoption, presently and for the future, provide for the observance of such state laws, making such alterations as the interests and conveniences of commerce and navigation may require, always keeping in mind that the great object of quarantine shall be secured.

Such has been the interpretation of the rights of the states to quarantine, and of that of congress over it, from the beginning of the federal government. Under it, the states and the United States, both having measurably concurrent rights of legislation in the matter, have reposed quietly and without any harm to either, until the acts now in question caused this controversy. The act of February 25, 1799 (1 Stats. at Large, 619), will show this. By that act, collectors, revenue officers, masters and crews of revenue cutters, and military officers in command of forts upon the coast, are required to aid in the execution of the state's quarantine laws. But then, and it may be observed particularly in reference to the acts of Massachusetts and New York, now in question, the law provides that nothing in the act "shall enable a state to collect a duty of tonnage or impost, without the consent of congress;" that no part of the cargo of any vessel shall in any case be taken out, otherwise than as by law is allowed, or according to the regulations thereafter established; thus showing that the state's quarantine power over the cargo, for the purpose of purifying it or the vessel, has been taken away. By the second section of the same act, the power of the states in respect to warehouses and other buildings for the purification of the cargo is also taken away, and exclusively assumed by the United States. And by the third section, in order that the states may be subjected to as little expense as possible, and that the safety of the public revenue may not be lessened, it is provided that the United States, under the orders of the president of the United States, shall purchase or erect suitable warehouses, with wharves and inclosures for goods and merchandise taken from vessels subject to quarantine, or other restraint, pursuant to the health laws of any state.

§ 1309. *The word "imposts" construed.*

And in regard to the word imposts, in the first section of the act, I may here remark, though I have heretofore given its meaning, that it means in the act, as well as it does in the constitution, personal imposts upon a foreigner enjoying the protection of a state; or it may be a condition of his admission (Martens, 97), as well as any tax or duty upon goods; and Martens, as well as all other jurists and writers upon international law, uses the word in the sense I have said it has, also, as "imposts on real estates and duties on the entry and consumption of merchandises." pp. 97, 98. But further, by the police power in the states they have reserved the right to be informed of the name and quality of every foreigner that arrives in the state. This, and no more than this, was Miln's Case, in 11 Pet., 102. But after they have been landed, as is said in Miln's Case. And it was suprising to me, in the argument of these cases, that that admission in Miln's Case was overlooked by those who spoke in favor of the constitutionality of the laws of Massachusetts and New York; for the right of New York to a list of passengers, notwithstanding the passenger laws of the United States, is put upon the ground that those laws "affect passengers whilst on their voyage, and until they shall have landed." And "after that, and when they shall have ceased to have any connection with the ship, and when, therefore, they shall have ceased to be passengers, the acts of congress applying to them as such, and only professing to legislate in relation to them as such, have then performed their office, and can with no propriety of language be said to come in conflict with the law of a state, whose operation only begins where that of the laws of congress ends." That is, that the Passenger Acts, as my brother Catron has shown in his opinion, extend to his protection from all state interference, by taxation or otherwise, from the time of his embarkation abroad until he is landed in the port of the United States for which the vessel sailed.

§ 1310. *The states may turn off from their territories foreigners who are paupers, vagabonds and fugitives from justice.*

The states have also reserved the police right to turn off from their territories paupers, vagabonds and fugitives from justice. But they have not reserved the use of taxation universally as the means to accomplish that object, as they had it before they became the United States. Having surrendered to the United States the sovereign police power over commerce, to be exercised by congress or the treaty-making power, it is necessarily a part of the power of the United States to determine who shall come to and reside in the United States for the purposes of trade, independently of every other condition of admittance which the states may attempt to impose upon such persons. When it is done in either way, the United States, of course, subject the foreigner to the laws of the United States, and cannot exempt him from the internal power of police of the states in any particular in which it is not constitutionally in conflict with the laws of the United States. And in this sense it is that, in treaties providing for such mutual admission of foreigners between nations, it is universally said, "but subject always to the laws and statutes of the two countries respectively;" but certainly not to such of the laws of a state as would exclude the foreigner, or which add another condition to his admission into the United States.

§ 1311. *A tax upon immigrants by the states is in conflict with the naturalization clause of the constitution.*

And further, I may here remark that this right of taxation claimed for the states upon foreign passengers is inconsistent with the naturalization clause in the constitution, and the laws of congress regulating it. If a state can, by taxation or otherwise, direct upon what terms foreigners may come into it, it may defeat the whole and long-cherished policy of this country and of the constitution in respect to immigrants coming to the United States.

§ 1312. *Quære: Whether congress can, in its power to regulate commerce, legislate for the removal of paupers, vagabonds and fugitives, or whether that is the exclusive right of the states.*

But I have said the states have the right to turn off paupers, vagabonds and fugitives from justice, and the states where slaves are have a constitutional right to exclude all such as are, from a common ancestry and country, of the same class of men. And when congress shall legislate,—if it be not disrespectful for one who is a member of the judiciary to suppose so absurd a thing of another department of the government,—to make paupers, vagabonds, suspected persons and fugitives from justice subjects of admission into the United States, I do not doubt it will be found and declared, should it ever become a matter for judicial decision, that such persons are not within the regulating power which the United States have over commerce. Paupers, vagabonds and fugitives never have been subjects of rightful national intercourse, or of commercial regulations, except in the transportation of them to distant colonies to get rid of them, or for punishment as convicts. They have no rights of national intercourse; no one has a right to transport them, without authority of law, from where they are to any other place, and their only rights where they may be are such as the law gives to all men who have not altogether forfeited its protection. The states may meet such persons upon their arrival in port, and may put them under all proper restraints. They may prevent them from entering their territories, may carry them out or drive them off. But can such a police power be rightfully exercised over those who are not paupers, vaga-

bonds or fugitives from justice? The international right of visitation forbids it. The freedom or liberty of commerce allowed by all European nations to the inhabitants of other nations does not permit it; and the constitutional obligations of the states of this Union to the United States, in respect to commerce and navigation and naturalization, have qualified the original discretion of the states as to who shall come and live in the United States. Of the extent of those qualifications, or what may be the rights of the United States and the states individually in that regard, I shall not speak now.

§ 1313. *The state has no discretion in excluding foreigners; it can do so only by way of absolute self-defense.*

But it was assumed that a state has unlimited discretion, in virtue of its unsundered police power, to determine what persons shall reside in it. Then it was said to follow, that the state can remove all persons who are thought dangerous to its welfare; and to this right to remove, it was said, the right to determine who shall enter the state is an inseparable incident. That erroneous proposition of the state's discretion in this matter has led to all the more mistaken inferences made from it. The error arose from its having been overlooked that a part of the supreme police power of a nation is identical, as I have shown it to be, with its sovereignty over commerce. Or, more properly speaking, the regulation of commerce is one of those particular rights collectively placed in the hands of the sovereign for the good of the state. Until it is shown that the police power in one of its particulars is not what it has just been said to be, the discretion of a state of this Union to determine what persons may come to and reside in it, and what persons may be removed from it, remains unproved. It cannot be proved, and the laws of Massachusetts and New York derive no support from police power in favor of their constitutionality.

§ 1314. *Cases distinguished.*

Some reliance in the argument was put upon the cases of *Holmes v. Jennison*, 14 Pet., 540; *Groves v. Slaughter*, 15 Pet., 449, and *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 539, to maintain the discretion of a state to say who shall come to and live in it. Why either case should have been cited for such a purpose I was at a loss to know, and have been more so from a subsequent examination of each of them. All that is decided in the case of *Holmes v. Jennison* is, that the states of this Union have no constitutional power to give up fugitives from justice to the authorities of a nation from which they have fled. That it is not an international obligation to do so, and that all authority to make treaties for such a purpose is in the United States.

The point ruled in the case of *Groves v. Slaughter* is, that the state of Mississippi could constitutionally prohibit negroes from being brought into that state for sale as merchandise, but that the provision in her constitution required legislation before it acted upon the subject-matter. The case of *Prigg v. Commonwealth of Pennsylvania* is inapplicable to the cases before us, except in the support which it gives to the construction of the police power, as stated in this opinion,—that it is applicable to idlers, vagabonds, paupers, and, I may add, fugitives from justice, and suspected persons. Miln's Case I will speak of hereafter, and now only say that no point was ruled in it, either in respect to commerce or the right of the state to a list of passengers who may come by sea into New York after they had landed, which gives any countenance or support to the laws now in question.

The fear expressed, that if the states have not the discretion to determine

who may come and live in them, the United States may introduce into the southern states emancipated negroes from the West Indies and elsewhere, has no foundation. It is not an allowable inference from the denial of that position, or the assertion of the reverse of it. All the political sovereignty of the United States, within the states, must be exercised according to the subject-matter upon which it may be brought to bear, and according to what was the actual condition of the states in their domestic institutions when the constitution was formed, until a state shall please to alter them. The constitution was formed by states in which slavery existed, and was not likely to be relinquished, and states in which slavery had been, but was abolished, or for the prospective abolition of which provision had been made by law. The undisturbed continuance of that difference between the states at that time, unless as it might be changed by a state itself, was the recognized condition in the constitution for the national Union. It has that, and can have no other, foundation. Is it not acknowledged by all that the ninth section of the first article of the constitution is a recognition of that fact? There are other clauses in the constitution equally, and some of them more, expressive of it.

§ 1315. *The constitution to be interpreted by the condition of the states when it was formed, their object in forming it, and by their recognition of its import.*

That is a very narrow view of the constitution which supposes that any political sovereign right given by it can be exercised, or was meant to be used, by the United States in such a way as to dissolve, or even disquiet, the fundamental organization of either of the states. The constitution is to be interpreted by what was the condition of the parties to it when it was formed, by their object and purpose in forming it, and by the actual recognition in it of the dissimilar institutions of the states. The exercise of constitutional power by the United States, or the consequences of its exercise, are not to be concluded by the summary logic of *ifs* and syllogisms. It will be found, too, should this matter of introducing free negroes into the southern states ever become the subject of judicial inquiry, that they have a guard against it in the constitution, making it altogether unnecessary for them to resort to the *casus gentis extraordinarius*, the *casus extremæ necessitatis* of nations, for their protection and preservation. They may rely upon the constitution, and the correct interpretation of it, without seeking to be relieved from any of their obligations under it, or having recourse to the *jus necessitatis* for self-preservation. I have purposely refrained from repeating anything that has been said in the opinions of my learned brothers, with whom I am united in pronouncing the laws of Massachusetts and New York in question unconstitutional. What they have said for themselves they have also said for me, and I do not believe that I have said anything in this opinion which is not sanctioned by them.

§ 1316. *City of New York v. Miln, 11 Pet., 102, explained.*

Having said all that I mean to say directly concerning the cases before us, I will now do what I have long wished to do, but for which a proper opportunity has not been presented before. It is to make a narrative in respect to the case of *City of New York v. Miln*, reported in 11 Pet., 102 (§§ 1274-83, *supra*), that hereafter the profession may know definitely what was and what was not decided in that case by this court. It has been much relied upon in the cases before us for what was not decided by the court. The opinion given by Mr. Justice Barbour in that case, though reported as the opinion of the court, had not at any time the concurrence of a majority of its members, except in this particular,—that so much of the act of New York as required the captain of

a vessel to report his passengers as the act directs it to be done was a police regulation, and therefore was not unconstitutional or a violation of the power of congress to regulate commerce. In that particular, and in that only, and, as it is said in the conclusion of the opinion, "that so much of the section of the act of the legislature of New York as applies to the breaches assigned in the declaration does not assume to regulate commerce between the port of New York and foreign ports, and that so much of said act is constitutional." 11 Pet., 143. But as to all besides in that opinion as to the constitutional power of congress to regulate commerce,—except the disclaimer in the one hundred and thirty-second page, that it was not intended to enter into any examination of the question whether the power to regulate commerce be or be not exclusive of the states,—and especially the declaration that persons were not the subjects of commerce, the opinion had not the assent of a majority of the members of this court, nor even that of a majority of the judges who concurred in the judgment. The report of the case in *Peters*, and the opinion of Mr. Justice Baldwin, accidentally excluded from the report, without the slightest fault in the then reporter of the court or in the clerk, but which we have in full in Baldwin's *View of the Constitution*, published in the same year, fully sustain what I have just said. I mention nothing from memory, and stand upon the record for all that I have said, or shall say, concerning the case.

The court then consisted of seven justices, including the chief justice; all of us were present at the argument; all of us were in consultation upon the case; all of us heard the opinions read, which were written by Messrs. Justices Thompson and Barbour, in the case; and all of us, except Mr. Justice Baldwin, were present in this room when Mr. Justice Barbour read the opinion which appears in *Peters* as the opinion of the court. The case had been argued by counsel on both sides as if the whole of the act of New York were involved in the certificate of the division of opinion by which it was brought before this court. The point certified was in these words: "That the act of the legislature of New York, mentioned in the plaintiff's declaration, assumes to regulate trade and commerce between the ports of New York and foreign ports, and is unconstitutional and void." In the consultation of the judges upon the case, as the report shows, the first point considered by us was one of jurisdiction. That is, that the point certified was a submission of the whole case, which is not permitted, and was not a specific point arising on the trial of the cause. The court thought it was the latter, principally for the reason given by Mr. Justice Thompson, as it appears in his opinion. That reason was, that the question arose upon a general demurrer to the declaration, and that the certificate under which the cause was sent to this court contains the pleadings upon which the question arose, which show that no part of the act was drawn in question except that which relates to the neglect of the master to report to the mayor or recorder an account of his passengers, according to the requisitions of the act. In the discussion of the case, however, by the judges, the nature and exclusiveness of the power in congress to regulate commerce was much considered. There was a divided mind among us about it. Four of the court being of the opinion, that, according to the constitution and the decisions of this court in *Gibbons v. Ogden* and in *Brown v. Maryland*, the power in congress to regulate commerce was exclusive. Three of them thought otherwise. And to this state of the court is owing the disclaimer in the opinion, already mentioned by me, that the exclusiveness of the power to regulate commerce was not in the case a point for examination.

But there was another point of difference among the judges in respect to what was commerce under the constitutional grant to congress, particularly whether it did not include an intercourse of persons and passengers in vessels. Two of the court — the report of the case shows it — thought, in the language of the opinion, that “persons are not subjects of commerce.” Mr. Justice Thompson declined giving any opinion on that point, and repeated it in the opinion published by him. Four of the justices, including Mr. Justice Baldwin, thought that commerce did comprehend the intercourse of persons or passengers. For this statement I refer to the opinion of Mr. Justice Thompson, to the dissenting opinion of Mr. Justice Story, to the opinion of Mr. Justice Baldwin, to the constantly avowed opinion of Mr. Justice M’Lean, and to what has always been known by the justices of this court to be my own opinion upon this point.

In this state of the opinions of the court, Mr. Justice Thompson was designated to write an opinion,—that the law in question was a police regulation, and not unconstitutional. He did so, and read to the court the opinion, which he afterwards published. It was objected to by a majority of the court, on account of some expressions in it concerning the power of congress to regulate commerce, and as our differences could not be reconciled, Mr. Justice Thompson said he would read it as his own. Then Mr. Justice Barbour was asked to write an opinion for the majority of the court. He did so, and read that which is printed as such, in our last conference of that term, the night before the adjournment of the court. The next day it was read in court, all of the judges being present when it was read, except Mr. Justice Baldwin. In the course of that morning’s sitting, or immediately after it, Mr. Justice Baldwin, having examined the opinion, objected to its being considered the opinion of the court, on account of what was said in it concerning the power of congress to regulate commerce, and what was commerce. He sought Mr. Justice Barbour, with the view of having it erased from the opinion, declaring, as all the rest of us knew, that his objection to the opinion of Mr. Justice Thompson was on account of what it contained upon the subject of commerce, that his objection to the reasoning upon the same matter in Mr. Justice Barbour’s opinion was stronger, and that he had only assented that an opinion for the court should be written, on the understanding that so much of the act of New York as was in issue by the pleadings should be treated as a regulation, not of commerce, but police. Without his concurrence, no opinion could have been written. Unfortunately, Mr. Justice Barbour had left the court room immediately after reading his opinion, already prepared to leave Washington in a steamer which was in waiting for him. Mr. Justice Baldwin did not see him. The court was adjourned. Then there was no authority to make any alteration in what had been read as the opinion of the court. Mr. Justice Baldwin wished it, but, under the circumstances of preparation which each judge was making for his departure from Washington, nothing was done, and Mr. Justice Baldwin determined to neutralize what he objected to in the opinion by publishing in the reports his own opinion of the case. That was not done, but he did so contemporarily with the publication of the reports, in his *View of the Constitution*. There it is, to speak for itself, and it shows, as I have said, that so much of the opinion in the case of *New York v. Miln*, 11 Pet., 102, as related to commerce, did not have the assent of Mr. Justice Baldwin, and, therefore, not the assent of a majority of the court.

How, then, did the case stand? Mr. Justice Thompson gave his own opinion,

agreeing with that of Mr. Justice Barbour, that so much of the section of the act of the legislature of New York as applies to the breaches assigned in the declaration does not assume to regulate commerce between the port of New York and foreign ports, and that so much of said section is constitutional, but giving his own views of the commercial question as it stood in relation to the case. The attitude of Mr. Justice Baldwin with respect to the opinion has just been told. Mr. Justice Story dissented from every part of the opinion, on the ground that the section of the act in controversy was a regulation of commerce, which a state could not constitutionally pass. Mr. Justice M'Lean is here to speak for himself, and he did then speak as he has done to-day in these cases concerning the power in congress to regulate commerce being exclusive, and held that persons are the subjects of commerce as well as goods, contrary to what is said in the opinion (one hundred and thirty-sixth page) that persons are not. I certainly objected to the opinion then, for the same reasons as Mr. Justice M'Lean. Thus there were left of the seven judges but two, the chief justice and Mr. Justice Barbour, in favor of the opinion as a whole.

I have made this narrative and explanation, under a solemn conviction of judicial duty, to disabuse the public mind from wrong impressions of what this court did decide in that case; and particularly from the misapprehension that it was ever intended by this court, in the case of *New York v. Miln*, to reverse or modify, in any way or in the slightest particular, what had been the judgments and opinions expressed by this court in the cases of *Gibbons v. Ogden* and *Brown v. Maryland*. And I am happy in being able to think, notwithstanding the differing opinions which have been expressed concerning what was decided in those cases, that they are likely to stand without reversal.

The chief justice, the morning after I had read the foregoing statement in the case of *New York v. Miln*, made another to counteract it, in which he says his recollections differ from mine in several particulars. I do not complain of it in any way. But it enables me to confirm my own in some degree from his, and in every other particular in which it does not give such assistance, the facts related by me are indisputable, being all in the report of the case in *Peters*, from which I took them. They are in exact coincidence, too, with my own recollections. The only fact in my statement not altogether, but in part, taken from the record, is Mr. Justice Baldwin's discontent with the opinion written by Mr. Justice Barbour, and his wish that it might not as a whole be published in our volume of reports as the opinion of the court. The chief justice admits that Mr. Justice Baldwin did apply to him after the adjournment of the court, and before they left Washington, for that purpose. Now if, by mistake or oversight, a judge shall fall into an admission, which more care afterwards enables him to recall and correct before the judgment has been published, but after it has been read, whatever may be the operation of the judgment, does it follow that the argument in the opinion in which the judgment is given continues to be the law of the court? And if the same judge, after more careful and matured thought, publishes contemporarily his opinion, differing from the *dictum* which had escaped his notice, will that make it law? Is it not plain that it is a case of mistake, which cannot make the law? And if his co-operation is essential to the validity of the original opinion, from those who may advocate it being thrown into the minority by his withdrawal, and his declaration that he never meant to co-operate in it in the particular objected to, can it be said that it ever was the law of the court? Is it at all an uncommon thing, in the English and American law reports, that a



case is published as law which is deemed afterwards not to be so, on account of error in its publication, from its not having been really the opinion of the court when it was published? Mistake in all cases restores things to the correct condition in which they were before the mistake was made, except where the policy of the law has determined that it shall be otherwise. A single mistaken and misstated case is not within that policy. Long acquiescence, or repeated judicial decisions, may be, and then only because the interests of society have been accommodated to the error.

But the chief justice says that he has the strongest reason to suppose that Mr. Justice Baldwin became satisfied, because, in his opinion in the case of *Groves v. Slaughter*, 15 Pet., 449, he quotes the case of *New York v. Miln* with approbation, when speaking in that case of the difference between commercial and police powers.

§ 1317. *The exclusive power of congress to regulate commerce.*

I certainly cannot object to the opinion of Mr. Justice Baldwin in *Groves v. Slaughter* being a test between the chief justice and myself in this matter; for Justice Baldwin's opinion in that case is the strongest proof that could have been given four years afterwards, by himself, that he never was reconciled to the opinion of Mr. Justice Barbour in *Miln's Case* as a whole. For instance, in that opinion he does not leave the exclusive power of congress to regulate commerce to the disclaimer in *Miln's Case*, that it was not the intention of the judges to decide that point in that case. He says: "That the power of congress to regulate commerce among the states is exclusive of any interference by the states has been, in my opinion, conclusively settled by the solemn opinions of this court in *Gibbons v. Ogden*, 9 Wheat., 186 (§§ 1183-1201, *supra*), and in *Brown v. State of Maryland*, 12 Wheat., 438 (§§ 1466-70, *infra*). If these decisions are not to be taken as the established construction of this clause of the constitution, I know of none which are not yet open to doubt; nor can there be any adjudications of this court which must be considered as authoritative upon any question, if these are not to be so on this." And the learned judge goes on to say: "Cases may indeed arise wherein there may be found difficulty in discriminating between regulations of commerce among the several states, and the regulation of the internal police of a state, but the subject-matter of such regulations of either description will lead to the true line which separates them, when they are examined with a disposition to avoid a collision between the powers granted to the federal government by the people of the several states, and those which they reserved exclusively to themselves."

§ 1318. *Commerce and police matters distinguished.*

"Commerce among the states, as defined by this court, is trade, traffic, intercourse and dealing in articles of commerce between states by its citizens or others, and carried on in more than one state. Police relates only to the internal concerns of one state, and commerce within it is purely a matter of internal regulation, when confined to those articles which have become so distributed as to form items in the common mass of property. It follows that any regulation which affects the commercial intercourse between any two or more states, referring solely thereto, is within the powers granted exclusively to congress, and that those regulations which affect only the commerce carried on within one state, or which refer only to subjects of internal police, are within the powers reserved." And then it is that the sentence follows cited by the chief justice to show that he had reason to suppose that Mr. Justice Baldwin had

become satisfied. The citation made by me from his opinion shows what his opinion was in respect to the power of congress to regulate commerce, confirming what I have said in my statement, that four of us were of the same opinion when that point was touched upon in the case of *Miln*, and that Mr. Justice Baldwin refused to sanction what was said by Mr. Justice Thompson in respect to it in the opinion written by him for the court in *Miln's Case*. And that he was not satisfied as to that sentence of Mr. Justice Barbour's opinion in which it is said that persons are not the subjects of commerce, is manifest from that part of his opinion in *Groves v. Slaughter*, in which he says that commerce is "trade, traffic, intercourse;" intercourse, in the sense of commerce, meaning, as it always does, "connection by reciprocal dealings between persons and nations." But further, the chief justice says that Mr. Justice Baldwin called upon him, and said there was a sentence or paragraph in the opinion with which he was dissatisfied, and wished altered, thus confirming all that I have said in respect to the case in what is in it concerning persons not being the subjects of commerce, that being the only declaration in the opinion relating to commerce, it having been previously declared that the exclusiveness of the regulation of commerce in congress was not to be decided. All that was meant to be decided in *Miln's Case* was, that the regulation stated in the certificate of division of opinion between the judges in the circuit court was not a regulation of commerce, but one of police. In respect to our lamented brother Barbour, not knowing the dissatisfaction of our brother Baldwin and other members of the court with the opinion, I know that he did know it. In regard to the chief justice's declaration, that he had never heard any further dissatisfaction expressed with the opinion by Mr. Justice Baldwin, and never at any time, until this case came before us, heard any from any other member of the court who had assented to or acquiesced in the opinion; while, of course, that must be taken to be so, as far as the chief justice is concerned, I must say that I have never, in any instance, heard the case of *Miln* cited for the purpose of showing that persons are not within the regulating power of congress over commerce, without at once saying to the counsel that that point had not been decided in that case. I have repeatedly done so in open court, and as I supposed, was heard by every member of it. I have only said, in reply to the chief justice's statement, what was necessary to show that it was not decided in *Miln's Case*, by this court, that persons are not within the power of congress to regulate commerce.

Indeed, it would be most extraordinary if the case of *Gibbons v. Ogden*, 9 Wheat., 1, could be considered as having been reversed by a single sentence in the opinion of *New York v. Miln*, 11 Pet., 102, upon a point, too, not in any way involved in the certificate of the division of opinion by which that case was brought to this court. The sentence is, that "they [persons] are not the subjects of commerce; and not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to congress to regulate commerce, and the prohibition to the states from imposing a duty on imported goods."

§ 1319. *The extent of the power to regulate commerce.*

In the case of *Gibbons v. Ogden*, the court said: "Commerce is traffic; but it is something more. It is intercourse. It describes the commercial intercourse between nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

Again: "These words comprehend every species of commercial intercourse

between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend." "In regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines." "If congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of congress may be exercised within a state." "The power of congress comprehends navigation within the limits of every state in the Union, so far as that navigation may be connected with commerce with foreign nations, or among the several states." "It is the power to regulate; that is, to prescribe the rule by which commerce is governed." "Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed, on that account, withdrawn from the control or protection of congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it never has been suspected that the general laws of navigation did not apply to them. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of cargo."

In my opinion the case of *Gibbons v. Ogden* rules the cases before us. If there were no other reasons, with such an authority to direct my course, I could not refrain from saying that the acts of Massachusetts and New York, so far as they are in question, are unconstitutional and void. The case of *Gibbons v. Ogden*, in the extent and variety of learning, and in the acuteness of distinction with which it was argued by counsel, is not surpassed by any other case in the reports of courts. In the consideration given to it by the court, there are proofs of judicial ability, and of close and precise discrimination of most difficult points, equal to any other judgment on record. To my mind, every proposition in it has a definite and unmistakable meaning. Commentaries cannot cover them up or make them doubtful. The case will always be a high and honorable proof of the eminence of the American bar of that day, and of the talents and distinguished ability of the judges who were then in the places which we now occupy. There were giants in those days, and I hope I may be allowed to say, without more than judicial impressiveness of manner or of words, that I rejoice that the structure raised by them for the defense of the constitution has not this day been weakened by their successors.

Concurring opinions were rendered by JUSTICES CATRON, M'KINLEY and GRIER.

NORRIS v. CITY OF BOSTON and SMITH v. TURNER.

Dissenting opinion by TANEY, C. J.

I do not concur in the judgment of the court in these two cases, and proceed to state the grounds on which I dissent.

The constitutionality of the laws of Massachusetts and New York in some respects depends upon the same principles. There are, however, different questions in the two cases, and I shall make myself better understood by examining separately one of the cases, and then pointing out how far the same reasoning applies to the other, and in what respect there is a difference between them; and, first, as to the case from Massachusetts.

This law meets the vessel after she has arrived in the harbor, and within the territorial limits of the state, but before the passengers have landed, and while they are still afloat on navigable water. It requires the state officer to go on board and examine into the condition of the passengers, and provides that, if any lunatic, idiot, maimed, aged or infirm person, incompetent, in the opinion of the examining officer, to maintain themselves, or who have been paupers in any other country, shall be found on board, such alien passenger shall not be permitted to land until the master, owner, consignee or agent of the vessel shall give bond, with sufficient security, that no such lunatic or indigent person shall become a city, town or state charge within ten years from the date of the bond. These provisions are contained in the first two sections. It is the third section that has given rise to this controversy, and which enacts that no alien passengers, other than those before spoken of, shall be permitted to land until the master, owner, consignee or agent of the vessel shall pay to the boarding officer the sum of \$2 for each passenger so landing; the money thus collected to be appropriated to the support of foreign paupers. This law is a part of the pauper laws of the state, and the provision in question is intended to create a fund for the support of alien paupers, and to prevent its own citizens from being burdened with their support.

I do not deem it material at this time to inquire whether the sum demanded is a tax or not. Of that question I shall speak hereafter. The character of the transaction and the meaning of the law cannot be misunderstood. If the alien chooses to remain on board, and to depart with the ship, or in any other vessel, the captain is not required to pay the money. Its payment is the condition upon which the state permits the alien passenger to come on shore and mingle with its citizens, and to reside among them. He obtains this privilege from the state by the payment of the money. It is demanded of the captain, and not from every separate passenger, for the convenience of collection. But the burden evidently falls on the passenger; and he in fact pays it, either in the enhanced price of his passage, or directly to the captain, before he is allowed to embark for the voyage. The nature of the transaction and the ordinary course of business show that this must be the case; and the present claim, therefore, comes before the court without any equitable considerations to recommend it, and does not call upon us to restore money to a party from whom it has been wrongfully exacted. If the plaintiff recovers, he will most probably obtain from the state the money which he has doubtless already received from the passenger, for the purpose of being paid to the state; and which, if the state is not entitled to it, ought to be refunded to the passenger. The writ of error, however, brings up nothing for revision here but the constitutionality of the law under which this money was demanded and paid, and that question I proceed to examine.

§ 1320. *A state may remove or exclude from its territory any person or description of persons whom it may regard as injurious to the welfare of its citizens.*

And the first inquiry is, whether, under the constitution of the United States, the federal government has the power to compel the several states to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment, this question lies at the foundation of the controversy in this case. I do not mean to say that the general government have, by treaty or act of congress, required the state of Massachusetts to permit the aliens in ques-

tion to land. I think there is no treaty or act of congress which can justly be so construed. But it is not necessary to examine that question until we have first inquired whether congress can lawfully exercise such a power, and whether the states are bound to submit to it. For if the people of the several states of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the state, would be an usurpation of power which this court could neither recognize nor enforce. I had supposed this question not now open to dispute. It was distinctly decided in *Holmes v. Jennison*, 14 Pet., 540; in *Groves v. Slaughter*, 15 Pet., 449; and in *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 539.

If these cases are to stand, the right of the state is undoubted. And it is equally clear, that, if it may remove from among its citizens any person or description of persons whom it regards as injurious to their welfare, it follows that it may meet them at the threshold and prevent them from entering. For it will hardly be said that the United States may permit them to enter, and compel the state to receive them, and that the state may immediately afterwards expel them. There could be no reason of policy or humanity for compelling the states, by the power of congress, to imbibe the poison, and then leaving them to find a remedy for it by their own exertions and at their own expense. Certainly, no such distinction can be found in the constitution, and such a division of power would be an inconsistency, not to say an absurdity, for which I presume no one will contend. If the state has the power to determine whether the persons objected to shall remain in the state in association with its citizens, it must, as an incident inseparably connected with it, have the right also to determine who shall enter. Indeed, in the case of *Groves v. Slaughter*, the Mississippi constitution prohibited the entry of the objectionable persons, and the opinions of the court throughout treat the exercise of this power as being the same with that of expelling them after they have entered. Neither can this be a concurrent power, and whether it belongs to the general or to the state government, the sovereignty which possesses the right must in its exercise be altogether independent of the other. If the United States have the power, then any legislation by the state in conflict with a treaty or act of congress would be void. And if the states possess it, then any act on the subject by the general government, in conflict with the state law, would also be void, and this court bound to disregard it. It must be paramount and absolute in the sovereignty which possesses it. A concurrent and equal power in the United States and the states, as to who should and who should not be permitted to reside in a state, would be a direct conflict of powers repugnant to each other, continually thwarting and defeating its exercise by either, and could result in nothing but disorder and confusion.

§ 1321. — *and it rests with the state to determine who are likely to be obnoxious to its citizens.*

Again: If the state has the right to exclude from its borders any person or persons whom it may regard as dangerous to the safety of its citizens, it must necessarily have the right to decide when and towards whom this power is to be exercised. It is in its nature a discretionary power, to be exercised according to the judgment of the party which possesses it. And it must, therefore, rest with the state to determine whether any particular class or description of

persons are likely to produce discontents or insurrection in its territory, or to taint the morals of its citizens, or to bring among them contagious diseases, or the evils and burdens of a numerous pauper population. For if the general government can in any respect, or by any form of legislation, control or restrain a state in the exercise of this power, or decide whether it has been exercised with proper discretion, and towards proper persons, and on proper occasions, then the real and substantial power would be in congress, and not in the states. In the cases decided in this court, and hereinbefore referred to, the power of determining who is or who is not dangerous to the interests and well-being of the people of the state has been uniformly admitted to reside in the state. I think it, therefore, to be very clear, both upon principle and the authority of adjudged cases, that the several states have a right to remove from among their people, and to prevent from entering the state, any person, or class or description of persons, whom it may deem dangerous or injurious to the interests and welfare of its citizens; and that the state has the exclusive right to determine, in its sound discretion, whether the danger does or does not exist, free from the control of the general government.

§ 1322. *There is no power in a state to exclude the officers or representatives of foreign governments.*

This brings me to speak more particularly of the Massachusetts law, now under consideration. It seems that Massachusetts deems the introduction of aliens into the state from foreign countries likely to produce in the state a numerous pauper population, heavily and injuriously burdensome to its citizens. It would be easy to show, from the public history of the times, that the apprehensions of the state are well founded; that a fearful amount of disease and pauperism is daily brought to our shores in emigrant ships, and that measures of precaution and self-defense have become absolutely necessary on the Atlantic border. But whether this law was necessary or not is not a question for this court; and I forbear, therefore, to discuss its justice and necessity. This court has no power to inquire whether a state has acted wisely or justly in the exercise of its reserved powers. Massachusetts had the sole and exclusive right to judge for herself whether any evil was to be apprehended from the introduction of alien passengers from foreign countries. And in the exercise of her discretion, she had a right to exclude them if she thought proper to do so. Of course, I do not speak of public functionaries or agents, or officers of foreign governments. Undoubtedly, no state has a right to interfere with the free ingress of persons of that description. But there does not appear to have been any such among the aliens who are the subjects of this suit, and no question, therefore, can arise on that score.

§ 1323. *Having the power to exclude foreigners, a state may admit them upon any terms she may impose.*

Massachusetts, then, having the right to refuse permission to alien passengers from foreign countries to land upon her territory, and the right to reject them as a class or description of persons who may prove injurious to her interests, was she bound to admit or reject them without reserve? Was she bound either to repel them altogether, or to admit them absolutely and unconditionally? And might she not admit them upon such securities and conditions as she supposed would protect the interest of her own citizens, while it enabled the state to extend the offices of humanity and kindness to the sick and helpless stranger? There is certainly no provision in the constitution which restrains the power of the state in this respect. And if she may reject

altogether, it follows that she may admit upon such terms and conditions as she thinks proper, and it cannot be material whether the security required be a bond to indemnify or the payment of a certain sum of money.

In a case where a party has a discretionary power to forbid or permit an act to be done, as he shall think best for his own interests, he is never bound absolutely and unconditionally to forbid or permit it. He may always permit it upon such terms and conditions as he supposes will make the act compatible with his own interests. I know no exception to the rule. An individual may forbid another from digging a ditch through his land to draw off water from the property of the party who desires the permission. Yet he may allow him to do it upon such conditions and terms as, in his judgment, are sufficient to protect his own property from overflow; and for this purpose he may either take a bond and security, or he may accept a sum of money in lieu of it, and take upon himself the obligation of guarding against the danger. The same rule must apply to governments who are charged with the duty of protecting their citizens. Massachusetts has legislated upon this principle. She requires bond and security from one class of aliens, and from another, whom she deems less likely to become chargeable, she accepts a sum of money, and takes upon herself the obligation of providing a remedy for the apprehended evil.

I do not understand that the lawfulness of the provision for taking bond, where the emigrants are actual paupers and unable to gain a livelihood, has been controverted. That question, it is true, is not before us in this case; but the right of the state to protect itself against the burden of supporting those who come to us from European almshouses seems to be conceded in the argument. Yet there is no provision in the constitution of the United States which makes any distinction between different descriptions of aliens, or which reserves the power to the state as to one class, and denies it over the other. And if no such distinction is to be found in the constitution, this court cannot ingraft one upon it. The power of the state as to these two classes of aliens must be regarded here as standing upon the same principles. It is in its nature and essence a discretionary power, and if it resides in the state as to the poor and the diseased, it must also reside in it as to all.

§ 1324. *Where a state has a power, it is not for this court to guard against its abuse.*

In both cases the power depends upon the same principles, and the same construction of the constitution of the United States; it results from the discretionary power which resides in a state to determine from what person or description of persons the danger of pauperism is to be apprehended, and to provide the necessary safeguards against it. Most evidently, this court cannot supervise the exercise of such a power by the state, nor control or regulate it, nor determine whether the occasion called for it, nor whether the funds raised have been properly administered. This would be substituting the discretion of the court for the discretionary power reserved to the state.

Moreover, if this court should undertake to exercise this supervisory power, it would take upon itself a duty which it is utterly incapable of discharging. For how could this court ascertain whether the persons classed by the boarding officer of the state as paupers belonged to that denomination or not? How could it ascertain what had been the pursuits, habits and mode of life of every emigrant, and how far he was liable to lose his health, and become, with a helpless family, a charge upon the citizens of the state? How could it determine who was sick and who was well? who was rich and who was poor? who was

likely to become chargeable and who not? Yet all this must be done, and must be decided, too, upon legal evidence, admissible in a court of justice, if it is determined that the state may provide against the admission of one description of aliens, but not against another; that it may take securities against paupers and persons diseased, but not against those who are in health or have the means of support; and that this court have the power to supervise the conduct of the state authorities, and to regulate it and determine whether it has been properly exercised or not. I can, therefore, see no ground for the exercise of this power by the government of the United States or any of its tribunals. In my opinion the clear, established and safe rule is, that it is reserved to the several states, to be exercised by them according to their own sound discretion, and according to their own views of what their interest and safety require. It is a power of self-preservation, and was never intended to be surrendered.

§ 1325. *How far the grant to congress of the power to regulate commerce restrained the states.*

But it is argued in support of the claim of the plaintiff, that the conveyance of passengers from foreign countries is a branch of commerce, and that the provisions of the Massachusetts law, which meet the ship on navigable water and detain her until the bond is given and the money paid, are a regulation of commerce; and that the grant to congress of the power to regulate commerce is of itself a prohibition to the states to make any regulation upon the subject. The construction of this article of the constitution was fully discussed in the opinions delivered in the License Cases, reported in 5 How., 504. I do not propose to repeat here what I then said, or what was said by other members of the court with whom I agreed. It will appear by the report of the case, that five of the justices of this court, being a majority of the whole bench, held that the grant of the power to congress was not a prohibition to the states to make such regulations as they deemed necessary, in their own ports and harbors, for the convenience of trade or the security of health; and that such regulations were valid, unless they came in conflict with an act of congress. After such opinions judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported. Referring to my opinion on that occasion, and the reasoning by which it is maintained, as showing what I still think upon the subject, I desire now to add to it a reference to the thirty-second number of the Federalist, which shows that the construction given to this clause of the constitution by a majority of the justices of this court is the same that was given to it at the time of its adoption by the eminent men of the day who were concerned in framing it, and active in supporting it. For in that number, it is explicitly affirmed that, "notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the states, to insert negative clauses prohibiting the exercise of them by the states." The grant of a general authority to regulate commerce is not, therefore, a prohibition to the states to make any regulations concerning it within their own territorial limits, not in conflict with the regulations of congress.



But I pass from this objection, which was sufficiently discussed in the License Cases, and come to the next objection founded on the same clause. It is this: that the law in question is a regulation of commerce, and is in conflict with the regulations of congress and with treaties, and must yield to the paramount authority over this subject granted to the United States. It is a sufficient answer to this argument to say, that no treaty or act of congress has been produced which gives, or attempts to give, to all aliens the right to land in a state. The act of March 2, 1799, ch. 23, § 46, has been referred to, and much pressed in the argument. But this law obviously does nothing more than exempt certain articles belonging to a passenger from the duties which the United States had a right to exact, if they thought proper. Undoubtedly, the law presupposes that the passenger will be permitted to land. But it does not attempt to confer on him the right. Indeed, the construction contended for would be a startling one to the states, if congress has the power now claimed for it. For neither this nor any other law of congress prescribes the character or condition of the persons who may be taken on board in a foreign port to be brought to the United States. It makes no regulations upon the subject, and leaves the selection altogether to the discretion and pleasure of the ship-owner or ship-master. The ship-owner, as well as the ship-master, is in many cases a foreigner, acting sometimes, perhaps, under the influence of foreign governments or foreign cities, and having no common interest or sympathy with the people of the United States; and he may be far more disposed to bring away the worst and most dangerous portion of the population rather than the moral and industrious citizen. And as the act of 1799 speaks of passengers generally, and makes no distinction as to their character or health, if the argument of the counsel for the plaintiff can be maintained, and this law gives every passenger which the ship-owner has selected and brought with him the right to land, then this act of congress has not only taken away from the states the right to determine who is and who is not fit to be received among them, but has delegated this high and delicate power to foreign ship-masters and foreign ship-owners. And if they have taken on board tenants of their almshouses or workhouses, or felons from their jails, if congress has the power contended for, and this act of congress will bear the construction given to it, and gives to every passenger the right to land, then this mass of pauperism and vice may be poured out upon the shores of a state in opposition to its laws, and the state authorities are not permitted to resist or prevent it. It is impossible, upon any sound principle of construction, so to interpret this law of congress. Its language will not justify it, nor can such be supposed to have been the policy of the United States or such its disposition towards the states. The general government merely intended to exercise its powers in exempting the articles mentioned from duties, leaving it to the states to determine whether it was compatible with their interest and safety to permit the person to land. And this power the states have always exercised before and since the passage of this act of congress.

The same answer may be given to the argument on treaty stipulations. The treaty of 1794, article 4, referred to and relied on, is no longer in force. But the same provision is, however, substantially contained in the first article of the convention with Great Britain, of July 3, 1815 (8 Stats. at Large, 228), with this exception: that it puts British subjects in this respect on the same footing with other foreigners. But the permission there mutually given, to reside and hire houses and warehouses, and to trade and traffic, is in express terms made

subject to the laws of the two countries respectively. Now, the privileges here given within the several states are all regulated by state laws, and the reference to the laws of this country necessarily applies to them, and subjects the foreigner to their decision and control. Indeed, the treaty may be said to disavow the construction now attempted to be given to it. Nor do I see how any argument against the validity of the state law can be drawn from the act of congress of 1819. On the contrary, this act seems accurately to mark the line of division between the powers of the general and state governments over this subject; and the powers of the former have been exercised in the passage of this law without encroaching on the rights of the latter. It regulates the number of passengers which may be taken on board and brought to this country from foreign ports, in proportion to the tonnage of the vessel, and directs that, at the time of making his entry at the custom-house, the captain shall deliver to the collector a list of the passengers taken on board at any foreign port or place, stating their age, sex and occupation, and whether they intend to become inhabitants of this country, and how many have died on the voyage; and this list is to be returned quarterly to the state department, to be laid before congress. But the law makes no provision for their landing, nor does it require any inspection as to their health or condition. These matters are evidently intended to be left to the state government, when the voyage has ended, by the proper custom-house entry. For it cannot be supposed that, if the legislature of the United States intended by this law to give the passengers a right to land, it would have been so regardless of the lives and health and interests of our own citizens as to make no inquiry and no examination upon a subject which so nearly concerned them. But it directs no inquiries, evidently because the power was believed to belong to the states. And as the landing of the passengers depended on the state laws, the inquiries as to their health and condition properly belonged to the state authorities. The act of 1819 may fairly be taken as denoting the true line of division between the two sovereignties, as established by the constitution of the United States and recognized by congress.

I forbear to speak of other laws and treaties referred to. They are of the same import, and are susceptible of the same answer. There is no conflict, therefore, between the law of Massachusetts and any treaty or law of the United States.

§ 1326. *The law of Massachusetts makes no attempt to obstruct commerce, but merely to protect the state by its police power from foreigners.*

Undoubtedly, vessels engaged in the transportation of passengers from foreign countries may be regulated by congress, and are a part of the commerce of the country. Congress may prescribe how the vessel shall be manned, and navigated, and equipped, and how many passengers she may bring, and what provision shall be made for them, and what tonnage she shall pay. But the law of Massachusetts now in question does not in any respect attempt to regulate this trade, or impose burdens upon it. I do not speak of the duty enjoined upon the pilot, because that provision is not now before us, although I see no objection to it. But this law imposes no tonnage duty on the ship, or any tax upon the captain or passengers for entering its waters. It merely refuses permission to the passengers to land until the security demanded by the state for the protection of its own people from the evils of pauperism has been given. If, however, the treaty or act of congress above referred to had attempted to compel the state to receive them without any security, the question would not

be on any conflicting regulations of commerce, but upon one far more important to the states, that is, the power of deciding who should or should not be permitted to reside among its citizens. Upon that subject I have already stated my opinion. I cannot believe that it was ever intended to vest in congress, by the general words in relation to the regulation of commerce, this overwhelming power over the states. For if the treaty stipulation before referred to can receive the construction given to it in the argument, and has that commanding power claimed for it over the states, then the emancipated slaves of the West Indies have at this hour the absolute right to reside, hire houses, and traffic and trade throughout the southern states, in spite of any state law to the contrary; inevitably producing the most serious discontent, and ultimately leading to the most painful consequences. It will hardly be said that such a power was granted to the general government in the confidence that it would not be abused. The statesmen of that day were too wise and too well read in the lessons of history and of their own times, to confer unnecessary authority under any such delusion. And I cannot imagine any power more unnecessary to the general government, and at the same time more dangerous and full of peril to the states.

§ 1327. *The clause relating to importation or migration of persons historically considered and construed.*

But there is another clause in the constitution which it is said confers the exclusive power over this subject upon the general government. The ninth section of the first article declares that the migration or importation of such persons as any of the states then existing should think proper to admit should not be prohibited by the congress prior to the year 1808, but that a tax or duty might be imposed on such importation, not exceeding \$10 for each importation. The word migration is supposed to apply to alien freemen voluntarily migrating to this country, and this clause to place their admission or migration entirely in the power of congress.

At the time of the adoption of the constitution, this clause was understood by its friends to apply altogether to slaves. The Madison Papers will show that it was introduced and adopted solely to prevent congress, before the time specified, from prohibiting the introduction of slaves from Africa into such states as should think proper to admit them. It was discussed on that ground in the debates upon it in the convention; and the same construction is given to it in the forty-second number of the Federalist, which was written by Mr. Madison; and certainly nobody could have understood the object and intention of this clause better than he did.

It appears, from this number of the Federalist, that those who in that day were opposed to the constitution, and endeavoring to prevent its adoption, represented the word "migration" as embracing freemen who might desire to migrate from Europe to this country, and objected to the clause because it put it in the power of congress to prevent it. But the objection made on that ground is dismissed in a few words, as being so evidently founded on misconstruction as to be unworthy of serious reply; and it is proper to remark that the objection then made was, that it was calculated to prevent voluntary and beneficial migration from Europe, which all the states desired to encourage. Now, the argument is, that it was inserted to secure it, and to prevent it from being interrupted by the states. If the word can be applied to voluntary immigrants, the construction put upon it by those who opposed the constitution is certainly the just one; for it is difficult to imagine why a power should be so

explicitly and carefully conferred on congress to prohibit immigration, unless the majority of the states desire to put an end to it, and to prevent any particular state from contravening this policy. But it is admitted on all hands that it was then the policy of all the states to encourage immigration, as it was also the policy of the far greater number of them to discourage the African slave-trade. And with these opposite views upon these two subjects, the framers of the constitution would never have bound them both together in the same clause, nor spoken of them as kindred subjects which ought to be treated alike, and which it would be the probable policy of congress to prohibit at the same time. No state could fear any evil from the discouragement of immigration by other states, because it would have the power of opening its own doors to the immigrant, and of securing to itself the advantages it desired. The refusal of other states could in no degree affect its interests or counteract its policy. It is only upon the ground that they considered it an evil, and desired to prevent it, that this word can be construed to mean freemen, and to class them in the same provision, and in the same words, with the importation of slaves. The limitation of the prohibition also shows that it does not apply to voluntary immigrants. Congress could not prohibit the migration and importation of such persons during the time specified "in such states as might think proper to admit them." This provision clearly implies that there was a well-known difference of policy among the states, upon the subject to which this article relates. Now, in regard to voluntary immigrants, all the states, without exception, not only admitted them, but encouraged them to come; and the words "in such states as may think proper to admit them," would have been useless and out of place if applied to voluntary immigrants. But, in relation to slaves, it was known to be otherwise; for, while the African slave trade was still permitted in some of the more southern states, it had been prohibited many years before, not only in what are now called free states, but also in states where slavery still exists. In Maryland, for example, it was prohibited as early as 1783. The qualification of the power of prohibition, therefore, by the words above mentioned, was entirely appropriate to the importation of slaves, but inappropriate and useless in relation to freemen. They could not and would not have been inserted, if the clause in question embraced them.

I admit that the word migration in this clause of the constitution has occasioned some difficulty in its construction; yet it was, in my judgment, inserted to prevent doubts or cavils upon its meaning; for as the words imports and importation in the English laws had always been applied to property and things, as contradistinguished from persons, it seems to have been apprehended that disputes might arise whether these words covered the introduction of men into the country, although these men were the property of the persons who brought them in. The framers of the constitution were unwilling to use the word slaves in the instrument, and described them as persons; and so describing them, they employed a word that would describe them as persons, and which had uniformly been used when persons were spoken of, and also the word which was always applied to matters of property. The whole context of the sentence, and its provisions and limitations, and the construction given to it by those who assisted in framing the clause in question, show that it was intended to embrace those persons only who were brought in as property.

But, apart from these considerations, and assuming that the word migration was intended to describe those who voluntarily came into the country, the power granted is merely a power to prohibit, not a power to compel the states

to admit. And it is carrying the powers of the general government by construction, and without express grant or necessary implication, much further than has ever heretofore been done, if the former is to be construed to carry with it the latter. The powers are totally different in their nature, and totally different in their action on the states. The prohibition could merely retard the growth of population in the states. It could bring upon them no danger, nor any new evil, moral or physical. But the power of compelling them to receive and to retain among them persons whom the state may deem dangerous to its peace, or who may be tainted with crimes or infectious diseases, or who may be a burden upon its industrious citizens, would subject its domestic concerns and social relations to the power of the federal government.

It would require very plain and unambiguous words to convince me that the states had consented thus to place themselves at the feet of the general government; and if this power is granted in regard to voluntary immigrants, it is equally granted in the case of slaves. The grant of power is the same, and in the same words, with respect to migration and to importation, with the exception of the right to impose a tax upon the latter; and if the states have granted this great power in one case, they have granted it in the other; and every state may be compelled to receive a cargo of slaves from Africa, whatever danger it may bring upon the state, and however earnestly it may desire to prevent it. If the word migration is supposed to include voluntary immigrants, it ought at least to be confined to the power granted, and not extended by construction to another power altogether unlike in its character and consequences, and far more formidable to the states.

§ 1328. *The word "imports" refers only to merchandise.*

But another clause is relied on by the plaintiff to show that this law is unconstitutional. It is said that passengers are imports, and that this charge is therefore an impost or duty on imports, and prohibited to the states by the second clause of the tenth section of the first article. This objection, as well as others which I have previously noticed, is in direct conflict with decisions heretofore made by this court. The point was directly presented in the case of *City of New York v. Miln*, 11 Pet., 102 (§§ 1274-83, *supra*); and was there deliberately considered, and the court decided that passengers clearly were not imports. This decision is perfectly in accordance with the definition of the word previously given in the case of *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*). Indeed, it not only accords with this definition, but with the long-established and well-settled meaning of the word. For I think it may be safely affirmed that, both in England and this country, the words imports and importation, in statutes, in statistical tables, in official reports, and in public debates, have uniformly been applied to articles of property, and never to passengers voluntarily coming to the country in ships; and in the debates of the convention itself, the words are constantly so used.

The members of the convention unquestionably used the words they inserted in the constitution in the same sense in which they used them in their debates. It is their object to be understood, and not to mislead, and they ought not to be supposed to have used familiar words in a new or unusual sense. And there is no reason to suppose that they did not use the word imports, when they inserted it in the constitution, in the sense in which it had been familiarly used for ages, and in which it was daily used by themselves. If in this court we are at liberty to give old words new meanings when we find them in the constitution,

there is no power which may not, by this mode of construction, be conferred on the general government and denied to the states.

§ 1329. *If a state improperly levies duties on imports, or exacts too much, what does not belong to the state is due to the federal government and cannot be recovered back.*

But if the plaintiff could succeed in maintaining that passengers were imports, and that the money demanded was a duty on imports, he would at the same time prove that it belongs to the United States, and not to him, and consequently that he is not entitled to recover it. The tenth section of the first article prohibits a state from laying any duty on imports or exports except what may be absolutely necessary for the execution of its inspection laws. Whatever is necessary for that purpose may therefore be laid by the state without the previous consent of congress. If passengers are imports, then their condition may be examined and inspected by an officer of the state, like any other import, for the purpose of ascertaining whether they may not, when landed, bring disease or pauperism into the state; for if the state is bound to permit them to land, its citizens have yet the right to know if there is danger, that they may endeavor to avert it, or to escape from it. They have, therefore, under the clause of the constitution above mentioned, the power to lay a duty on this import, as it is called, to pay the necessary expenses of the inspection. It is, however, said, that more than sufficient to pay the necessary expenses of the inspection was collected, and that the duty was laid also for other purposes. This is true. But it does not follow that the party who paid the money is entitled to recover it back from the state. On the contrary, it is expressly provided, in the clause above mentioned, that the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States. If, therefore, these passengers were imports, within the meaning of this clause of the constitution, and the money in question a duty on imports, then the net produce or surplus, after paying the necessary expenses of inspection, belongs to the treasury of the United States. The plaintiff has no right to it, and cannot maintain a suit for it. It is appropriated by the express words of the constitution to the United States, and they, and they alone, would have a right to claim it from the state. The argument, however, that passengers are imports, is, in my judgment, most evidently without any reasonable foundation.

The only remaining topic which seems to require examination is the objection that the money demanded is a tax on the captain of the vessel, and therefore a regulation of commerce. This argument, I think, is sufficiently answered by what I have already said as to the real and true character of the transaction, and the relative powers of the Union and the states. But I proceed to inquire whether, if the law of Massachusetts be a tax, it is not a legitimate exercise of its taxing power, putting aside for the present the other considerations hereinbefore mentioned, and which I think amply sufficient to maintain its validity.

§ 1330. *The taxing power of the states, how far surrendered.*

Undoubtedly the ship, although engaged in the transportation of passengers, is a vehicle of commerce, and within the power of regulation granted to the general government; and I assent fully to the doctrine upon that subject laid down in the case of *Gibbons v. Ogden*, 9 Wheat., 1. But it has always been held that the power to regulate commerce does not give to congress the power

to tax it, nor prohibit the states from taxing it in their own ports, and within their own jurisdiction. The authority of congress to lay taxes upon it is derived from the express grant of power, in the eighth section of the first article, to lay and collect taxes, duties, imposts and excises, and the inability of the states to tax it arises from the express prohibition contained in the tenth section of the same article. This was the construction of the constitution at the time of its adoption, the construction under which the people of the states adopted it, and which has been affirmed, in the clearest terms, by the decisions of this court. In the thirty-second number of the *Federalist*, before referred to and several of the preceding numbers, the construction of the constitution as to the taxing power of the general government and of the states is very fully examined, and with all that clearness and ability which everywhere mark the labors of its distinguished authors; and in these numbers, and more especially in the one above mentioned, the construction above stated is given to the constitution, and supported by the most conclusive arguments. It maintains that no right of taxation which the states had previously enjoyed was surrendered, unless expressly prohibited; that it was not impaired by any affirmative grant of power to the general government; that duties on imports were a part of the taxing power; and that the states would have had a right, after the adoption of the constitution, to lay duties on imports and exports, if they had not been expressly prohibited.

The grant of the power to regulate commerce, therefore, did not, in the opinion of Mr. Hamilton, Mr. Madison and Mr. Jay, prohibit the states from laying imposts and duties upon imports brought into their own territories. It did not apply to the right of taxation in either sovereignty, the taxing power being a distinct and separate power from the regulation of commerce; and the right of taxation in the states remaining over every subject where it before existed, with the exception only of those expressly prohibited. This construction, as given by the *Federalist*, was recognized as the true one, and affirmed by this court, in the case of *Gibbons v. Ogden*, 9 Wheat., 201 (§§ 1183-1201, *supra*). The passage upon this subject is so clear and forcible that I quote the words used in the opinion of the court, which was delivered by Chief Justice Marshall. "In a separate clause," he says, "of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power not before conferred. The constitution, then, considers those powers as substantive and distinct from each other, and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes; and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the states on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the constitution contained no prohibition upon the subject. This prohibition, then, is an exception from the acknowledged power of the states to levy taxes, not from the questionable power to regulate commerce."

With such authorities to support me, so clearly and explicitly stating the doctrine, it cannot be necessary to pursue the argument further.

I may, therefore, safely assume that, according to the true construction of the constitution, the power granted to congress to regulate commerce did not in any degree abridge the power of taxation in the states; and that they would at this day have the right to tax the merchandise brought into their ports and harbors by the authority and under the regulations of congress, had they not

been expressly prohibited. They are expressly prohibited from laying any duty on imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying any tonnage duty. So far their taxing power over commerce is restrained, but no further. They retain all the rest; and if the money demanded is a tax upon commerce, or the instrument or vehicle of commerce, it furnishes no objection to it unless it is a duty on imports or a tonnage duty, for these alone are forbidden. And this brings me back to the question whether alien passengers from a foreign country are imports. I have already discussed that question, and need not repeat what I have said. Most clearly, in my opinion, they are not imports; and if they are not, then, according to the authorities referred to, the state has a right to tax them,—their authority to tax not being abridged in any respect by the power in the general government to regulate commerce. I say nothing as to its being a tonnage duty, for, although mentioned in the argument, I do not suppose any reliance could be placed upon it.

It is said that this is a tax upon the captain, and therefore a tax upon an instrument of commerce. According to the authorities before referred to, if it were a tax on the captain it would be no objection to it, unless it were indirectly a duty on imports or tonnage. Unquestionably, a tax on the captain of a ship, bringing in merchandise, would be indirectly a tax on imports, and consequently unlawful; but his being an instrument of commerce and navigation does not make it so; for a tax upon the instrument of commerce is not forbidden. Indeed, taxes upon property in ships are continually laid, and their validity never yet doubted. And to maintain that a tax upon him is invalid, it must first be shown that passengers are imports or merchandise, and that the tax was therefore indirectly a tax upon imports.

But although this money is demanded of the captain, and required to be paid by him or his owner before the passenger is landed, it is in no proper and legitimate sense of the word a tax on him. Goods and merchandise cannot be landed by the captain until the duties upon them are paid or secured. He may, if he pleases, pay the duty without waiting for his owner or consignee. So here the captain, if he chose, might pay the money and obtain the privilege of landing his passengers without waiting for his owner or consignee. But he was under no obligation to do it. Like the case of a cargo, he could not land his passengers until it was done. Yet the duties demanded in the former case have never been supposed to be a tax on the captain, but upon the goods imported. And it would be against all analogy, and against the ordinary construction of all statutes, to call this demand a tax on the captain. The amount demanded depends upon the number of passengers who desire to land. It is not a fixed amount on every captain or every ship engaged in the passenger trade; nor upon her amount of tonnage. It is no objection, then, to the Massachusetts law to say that the ship is a vehicle or the captain an instrument of commerce.

§ 1331. *The taxing power of a state is restrained only when it exacts a duty on imports or tonnage.*

The taxing power of the state is restrained only where the tax is directly or indirectly a duty on imports or tonnage. And the case before us is the first in which this power has been held to be still further abridged by mere affirmative grants of power to the general government. In my judgment, this restriction on the power of the states is a new doctrine, in opposition to the contemporaneous construction and the authority of adjudged cases. And if it is hereafter



to be the law of this court, that the power to regulate commerce has abridged the taxing power of the states upon the vehicles or instruments of commerce, I cannot foresee to what it may lead; whether the same prohibition, upon the same principle, may not be carried out in respect to ship-owners and merchandise in a way seriously to impair the powers of taxation which have heretofore been exercised by the states.

I conclude the subject by quoting the language of Chief Justice Marshall in the case of *Providence Bank v. Billings*, in 4 Pet., 561 (§§ 2321-24, *infra*), where, speaking upon this subject, he says: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and assented to by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it,—that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

Such has heretofore been the language of this court, and I can see nothing in the power granted to congress to regulate commerce that shows a deliberate purpose on the part of the states who adopted the constitution to abandon any right of taxation, except what is directly prohibited. The contrary appears in the authentic publications of the time.

It cannot be necessary to say anything upon the article of the constitution which gives to congress the power to establish a uniform rule of naturalization. The motive and object of this provision are too plain to be misunderstood. Under the constitution of the United States, citizens of each state are entitled to the privileges and immunities of citizens in the several states; and no state would be willing that another state should determine for it what foreigner should become one of its citizens, and be entitled to hold lands and to vote at its elections. For, without this provision, any one state could have given the right of citizenship in every other state; and, as every citizen of a state is also a citizen of the United States, a single state, without this provision, might have given to any number of foreigners it pleased the right to all the privileges of citizenship in commerce, trade and navigation, although they did not even reside amongst us. The nature of our institutions under the federal government made it a matter of absolute necessity that this power should be confided to the government of the Union, where all the states were represented, and where all had a voice; a necessity so obvious that no statesman could have overlooked it. The article has nothing to do with the admission or rejection of aliens, nor with immigration, but with the rights of citizenship. Its sole object was to prevent one state from forcing upon all the others, and upon the general government, persons as citizens whom they were unwilling to admit as such.

§ 1332. *Distinction between tax on passengers and license tax upon importers.*

It is proper to add that the state laws which were under examination in the license cases applied altogether to merchandise of the description mentioned in those laws which was imported into a state from foreign countries or from another state; and as the states have no power to lay a tax or duty on imports, the laws in question were subject to the control of congress until the articles had ceased to be imports, according to the legal meaning of the word. And it

is with reference to such importations and regulations of congress and the states concerning them, that the paramount power of congress is spoken of in some of the opinions then delivered. The questions as to the power of a state to exclude from its territories such aliens as it may deem unfit to reside among its citizens, and to prescribe the conditions on which they may enter it, and as to the power of a state to levy a tax for revenue upon alien passengers arriving from foreign ports, were neither of them involved in those cases, and were not considered or discussed in the opinions.

I come now to the case from New York. The object of this law is to guard its citizens, not only from the burdens and evils of foreign paupers, but also against the introduction of contagious diseases. It is not, therefore, like the law of Massachusetts, confined to aliens, but the money is required to be paid for every passenger arriving from a foreign port. The tax is imposed on the passenger in this case clearly and distinctly; for, although the captain who lands them is made liable for the collection, yet a right is expressly secured to him to recover it from the passenger. There can be no objection to this law upon the ground that the burden is imposed upon citizens of other states, because citizens of New York are equally liable; but embracing, as it does, its own citizens and citizens of other states, when they arrive from a foreign port, the right of a state to determine what person or class of persons shall reside among them does not arise, and what I have said upon that subject in the Boston case is inapplicable to this. In every other respect, however, it stands upon the same principles, involving also other and further considerations, which I proceed to notice, and which place it upon grounds equally firm with the case from Massachusetts.

§ 1333. *A state may protect itself by quarantine laws against vessels bringing persons afflicted with contagious diseases, and tax the vessels for the expenses incurred thereby.*

It will be admitted, I understand, that New York has the right to protect herself from contagious diseases, and possesses the right to inspect ships with cargoes, and to determine when it is safe to permit the vessel to come to the wharf, or the cargo to be discharged. In other words, it may establish quarantine laws. Consequently the state may tax the ship and cargo with the expenses of inspection, and with the costs and expenses of all measures deemed necessary by the state authorities. This is uniformly the case in quarantine regulations; and although there is not the least appearance of disease in the crew, and the cargo is free from taint, yet if the ship comes from a port where a contagious disease is supposed to exist, she is always placed under quarantine and subjected to the delay and expenses incident to that condition, and neither the crew nor cargo suffered to land until the state authorities are satisfied that it may be done without danger. The power of deciding from what port or ports there is danger of disease, and what ship or crew shall be made subject to quarantine on account of the port from which she sailed, and what precautions and securities are required to guard against it, must of necessity belong to the state authorities, for otherwise the power to direct the quarantine could not be executed. And this power of a state has been constantly maintained and affirmed in this court whenever the subject has been under consideration. And when the state authorities have directed the quarantine, if proof should be offered showing that the foreign ports to which it applied were free from disease, and that there was no just ground for apprehension, this court would hardly, upon that ground, feel itself authorized to pronounce the expenses

charged upon the vessel to be unconstitutional, and the law imposing them to be void.

Upon every principle of reason and justice the same rule must be applied to passengers that is applied to ships and cargoes. If, for example, while rumors were recently prevailing that the cholera had shown itself in the principal seaport towns of Europe, New York had been injudicious enough to embarrass her own trade by placing at quarantine all vessels and persons coming from those ports, and burdened them with the heavy expenses and ruinous delays incident to that measure,—or if she were to do so now, when apprehensions are felt that it may again suddenly make its appearance in the great marts of European trade,—this court certainly would not undertake to determine that these fears are groundless, and precautionary measures unnecessary, and the law therefore unconstitutional, and that every passenger might land at his own pleasure. Nobody, I am sure, will contend for such a power. And however groundless the apprehension, and however injurious and uncalled for such regulations may be, still, if adopted by the state, they must be obeyed, and the courts of the United States cannot treat them as nullities.

§ 1334. *A state may tax foreign passengers with the expense of sanitary measures which their arrival has rendered prudent.*

If the state has the same right to guard itself from persons from whom infection is feared that it has to protect itself against the danger arising from ships with cargoes, it follows that it may exercise the same power in regard to the former that it exercises in relation to the latter, and may tax them with the expense of the sanitary measures which their arrival from a foreign port is supposed to render necessary or prudent. For the expenses imposed on ships with cargoes, or on the captain or owner, are as much a tax as the demand of a particular sum to be paid to the officer of the state, to be expended for the same purpose. It is in truth always the demand of a sum of money to indemnify the state for the expense it incurs. And, as I have already said, these charges are not always made and enforced against ships actually infected with disease, but frequently upon a particular class of vessels; that is to say, upon all ships coming from ports from which danger is apprehended; upon the sound and healthy as well as the infected. The charge is not made upon those ships alone which bring disease with them, but upon all that come from a port or ports from which it is feared disease may be brought. It is true the expenses may and do differ in amount, according to the condition of the ship and cargo. Yet all are subjected to the tax, to the amount of the charges incurred by the state.

Now, in the great commercial emporium of New York, hundreds are almost daily arriving from different parts of the world, and that multitude of strangers, among whom are always many of the indigent and infirm, inevitably produces a mass of pauperism, which, if not otherwise provided for, must press heavily on the industry of its citizens; and which, moreover, constantly subjects them to the danger of infectious diseases. It is to guard them against these dangers that the law in question was passed. The apprehensions which appear to have given rise to it may be without foundation as to some of the foreign ports from which passengers have arrived, but that is not a subject of inquiry here; and it will hardly be denied that there are sufficient grounds for apprehension and for measures of precaution as to many of the places from which passenger ships are frequently arriving. Indeed, it can hardly be said that there is any European port from which emigrants usually come which can be regarded as an exception.

The danger arising from passenger ships cannot be provided against, with a due regard to the interests and convenience of trade and to the calls of humanity, by precisely the same means that are usually employed in cases of ships with cargoes. In the latter case, you may act without difficulty upon the particular ship, and charge it with the expenses which are incident to the quarantine regulations. But how are you to provide for hundreds of sick and suffering passengers? for infancy and age? for those who have no means, who are not objects of taxation, but of charity? You must have an extensive hospital, suitable grounds about it, nurses and physicians, and provide food and medicine for them. And it is but just that these expenses should be borne by the class of persons who make them necessary; that is to say, the passengers from foreign ports. It is from them, as a class, that the danger is feared, and they occasion the expenditure. They are all entitled to share in the relief which is provided, and the state cannot foresee which of them will require it and which will not. It is provided for all that need it, and all should, therefore, contribute. You must deal with them as you do with ships with merchandise and crews arriving from ports where infectious diseases are supposed to exist; when, although the crew are in perfect health, and the ship and cargo free from infection, yet the ship-owner must bear the expense of the sanitary precautions which are supposed to be necessary on account of the place from which the vessel comes. The state might, it is true, have adopted towards the passenger ships the quarantine regulations usually applied to ships with merchandise. It might have directed that the passenger ships from any foreign port should be anchored in the stream, and the passengers not permitted to land for the period of time deemed prudent. And if this had been done, the ship-owner would have been burdened with the support of his numerous passengers, and his ship detained for days, or even weeks after the voyage was ended. And if a contagious disease had broken out on the passage, or appeared after the vessel arrived in port, the delay and expense to him would have been still more serious.

The sanitary measures prescribed by this law are far more favorable to the passengers than the ancient regulations, and incomparably more so to the feeble, the sick, and the poor. They are far more favorable, also, and less burdensome to the ship-owner; and no one, I think, can fail to see that the ancient quarantine regulations, when applied to passenger ships, are altogether unsuited to the present condition of things, to the convenience of trade, and to the enlightened policy which governs our intercourse with foreign nations. The ancient quarantine regulations were introduced when the passenger trade as a regular occupation was unknown, and when the intercourse between nations was totally unlike what it is at the present day. And after all, these quarantine regulations are nothing more than the mode in which a nation exercises its power of guarding its citizens from the danger of disease. It was no doubt well suited to the state of the world at the time when it was generally adopted; but can there be any reason why a state may not adopt other sanitary regulations in the place of them, more suitable to the free, speedy and extended intercourse of modern times? Can there be any reason why they should not be made less oppressive to the passenger, and to the ship-owner and mariner, and less embarrassing and injurious to commerce? This is evidently what the New York law intended to accomplish, and has accomplished, while the law has been permitted to stand. It is no more a regulation of commerce, and, indeed, is far less burdensome and occasions less interruption to commerce, than the ancient quarantine regulations. And I cannot see upon what ground it can be supposed that

the constitution of the United States permits a state to use the ancient means of guarding the health of its citizens, and at the same time denies to it the power of mitigating its hardships and of adapting its sanitary regulation to the extended and incessant intercourse with foreign nations, and the more enlightened philanthropy of modern times; nor why the state should be denied the privilege of providing for the sick and suffering on shore, instead of leaving them to perish on shipboard. Quarantine regulations are not specific and unalterable powers in a state; they are but the means of executing a power. And certainly other and better means may be adopted in place of them, if they are not prohibited by the constitution of the United States. And if the old mode is constitutional, the one adopted by the law of New York must be equally free from objection. Indeed, the case of *City of New York v. Miln*, 11 Pet., 102, so often referred to in the argument, ought, in my judgment, to decide this. It seems to me that the present case is entirely within the principles there ruled by the court.

I had not intended to say anything further in relation to the case of *New York v. Miln*, but the remarks of one of my brethren have rendered it necessary for me to speak of it more particularly, since I have referred to it as the deliberate judgment of the court. It is eleven years since that decision was pronounced. After that lapse of time, I am sensible that I ought not to undertake to state everything that passed in conference or in private conversations, because I may be mistaken in some particulars; although my impressions are strong that all the circumstances are yet in my memory. And I am the less disposed to enter upon such a statement, because, in my judgment, its judicial authority ought not to rest on any such circumstances depending on individual memory. The court, at that time, consisted of seven members; four of them are dead, and among them, the eminent jurist who delivered the opinion of the court. All of the seven judges were present, and partook in the deliberations which preceded the decision. The opinion must have been read in conference, and assented to or acquiesced in by a majority of the court, precisely as it stood, otherwise it could not have been delivered as the court's opinion. It was delivered from the bench in open court, as usual, and only one of the seven judges, Mr. Justice Story, dissented. Mr. Justice Thompson delivered his own opinion, which concurred in the opinion of the court; but which, at the same time, added another ground, which the court declined taking, and determined to leave open. This will be seen by referring to the opinions. And if an opinion thus prepared and delivered and promulgated in the official report may now be put aside, on the ground that it did not express what at that time was the opinion of the majority of the court, I do not see how the decisions, when announced by a single judge (as is usual when the majority concur), can hereafter command the public confidence. What is said to have happened in this case may, for aught we know, have happened in others. In *Gibbons v. Ogden*, for example, or *Brown v. The State of Maryland*, which have been so often referred to.

The question which the court determined to leave open was, whether regulations of commerce, as such, by a state within its own territories, are prohibited by the grant of the power to congress. This appears in the opinion itself; and the law of New York was maintained on what was called the police power of the state. I ought to add, as Mr. Justice Baldwin has been particularly referred to, that the court adjourned on the day the opinion was delivered; and on the next day he called on me and said there was a sentence, or a paragraph, I do

not remember which, that had escaped his attention, and which he was dissatisfied with and wished altered. Of course nothing could be done, as the court had separated, and Mr. Justice Barbour, as well as others, had left town. Mr. Justice Barbour and Mr. Justice Baldwin were both present at the next term, and for several terms after; but I never heard any further dissatisfaction expressed with the opinion by Mr. Justice Baldwin; and never at any time, until this case came before us, heard any from any other member of the court who had assented to or acquiesced in the opinion, nor any proposition to correct it. I have no reason to suppose that Mr. Justice Barbour ever heard, in his life-time, that the accuracy of his opinion had been questioned, or that any alteration had been desired in it. And I have the strongest reason to suppose that Mr. Justice Baldwin had become satisfied, because, in his opinion in *Groves v. Slaughter*, he quotes the case of *New York v. Miln* with approbation, when speaking, in that case, of the difference between commercial and police power. The passage is in 15 Pet., 511, where he uses the following language: "The opinion of this court in the case of *Miln v. New York*, 11 Pet., 130, etc., draws the true line between the two classes of regulations, and gives an easy solution to any doubt which may arise on the clause of the constitution of Mississippi which has been under consideration." I quote his words as judicially spoken, and forming a part of the official report.

I have deemed it my duty to say this much, as I am one of the three surviving judges who sat in that case. My silence would justly have created the belief that I concurred in the statement which has been made in relation to the case of which I am speaking. But I do not concur. My recollections, on the contrary, differ from it in several particulars. But it would be out of place to enter on such a discussion here. All I desire to say is, that I know nothing that, in my judgment, ought to deprive the case of *New York v. Miln* of its full judicial weight as it stands in the official report. Mr. Justice Barbour delivered the opinion. Mr. Justice Thompson's opinion maintains, in the main, the same principles; Mr. Justice Baldwin, four years afterwards, quoted it with approbation; and I certainly assented to it,—making a majority of the whole court. I speak of the opinion of my deceased brethren from their public acts. Of the opinions of those who sit beside me I have no right to speak, because they are yet here and have spoken for themselves. But it is due to myself to say, that certainly, at the time the opinion was delivered, I had no reason to suppose that they did not both fully concur in the reasoning and principles, as well as in the judgment. And if the decision now made is to come in conflict with the principles maintained in that case, those who follow us in these seats must hereafter decide between the two cases, and determine which of them best accords with the true construction of the constitution, and ought, therefore, to stand. The law now in question, like the law under consideration in the case of *New York v. Miln*, is, in all of its substantial objects and provisions, in strict analogy to the ordinary quarantine regulations in relation to ships with cargoes from places supposed to be dangerous; at least as much so as the nature of the danger brought by a passenger ship, and the means necessary to guard against it, will permit.

But if this law is held to be invalid, either because it is a regulation of commerce, or because it comes in conflict with a law of congress, in what mode can the state protect itself? How can it provide against the danger of pestilence and pauperism from passenger ships? It is admitted that it has a right to do so; that want and disease are not the subjects of commerce, and not within

the power granted to congress. They do not obey its laws. Yet, if the state has the right, there must be a remedy, in some form or other, in its own hands, as there is in the case of ships with cargoes. The state can scarcely be required to take upon itself, and impose upon the industry of its citizens, the duty of supporting the immense mass of poverty and helplessness which is now pressing so heavily upon property in Europe, and which it is endeavoring to throw off. It cannot be expected that it should take upon itself the burden of providing buildings, grounds, food and all the necessary comforts for the multitude of helpless and poor passengers who are daily arriving from foreign ports. Neither, I presume, will it be expected that the citizens of New York should disregard the calls of sympathy and charity, and repulse from their shores the needy and wretched who are seeking an asylum amongst them. Those who deny the legality of the mode adopted would seem to be called upon to point out another consistent with the rights and safety of the state, and with the interests of commerce in the present condition of the commercial world, and not inconsistent with the obligations of humanity. I have heard none suggested, and I think it would be difficult to devise one on the principles on which this case is decided, unless the health and the lives of the citizens of every state are made altogether dependent upon the protection of the federal government, and the reserved powers of the states over this subject, which were affirmed by this court in *Gibbons v. Ogden*, 9 Wheat., 1, and *Brown v. State of Maryland*, 12 Wheat., 419, are now to be denied.

§ 1335. *Brown v. State of Maryland distinguished.*

With regard to the taxing power in the state, the case of *Brown v. The State of Maryland*, referred to in the argument, does not apply to it. The rights of the ship-owner or the captain were in no degree involved in that suit. Nor was there any question as to when the voyage terminated, as to the ship, or when passengers were entitled to land. The case turned altogether upon the rights of the importer, the owner of imported goods; and the inquiry was, how long and under what circumstances they continued, after they had been actually landed, to be imports or parts of foreign commerce, subject to the control of congress, and exempt, therefore, from taxation by the state. And even with regard to the importer, that case did not decide that he was not liable to be taxed for the amount of his capital employed in trade, although these imports were a part of that capital.

But here there is no owner. It is the case of passengers — freemen. It is admitted that they are not exempt from taxation after they are on shore. And the question is: When was the voyage or passage ended, and when did the captain and passengers pass from the jurisdiction and protection of the general government and enter into that of the state. The act of 1819 regulated and prescribed the duties of the ship-owner and captain during the voyage, and until the entry was made at the custom-house and the proper list delivered. It makes no further provision in relation to any of the parties. The voyage was evidently regarded as then completed, and the captain and passengers as passing from the protection and regulations of congress, into the protection and exclusive jurisdiction of the state. The passengers were no longer under the control of the captain. They might have landed where and when they pleased, if the state law permitted it, and the captain had no right to prevent them. If he attempted to do so, there was no law of congress to afford redress or to grant relief. They must have looked for protection to the state law and the state authorities. If a murder had been committed, there was no law of con-

gress to punish it. The personal safety of the passengers and the captain, and their rights of property, were exclusively under the jurisdiction and protection of the state. If the right of taxation did not exist in this case in return for the protection afforded, it is, I think, a new exception to the general rule upon that subject. For all the parties, the captain as well as the passengers, were as entirely dependent for the protection of their rights upon the state authorities as if they were dwelling in a house in one of its cities; and I cannot see why they should not be equally liable to be taxed, when no clause can be found in the constitution of the United States which prohibits it. The different provisions of the two laws, and the different circumstances of the two cases, made it necessary to say this much concerning the case from New York. In all other respects, except those to which I have adverted, they stand upon the same principles, and what I have said of the Boston case is equally applicable to this.

In speaking of the taxing power in this case, I must, however, be understood as speaking of it as it is presented in the record,—that is to say, as the case of passengers from a foreign port. The provisions contained in that law relating to American citizens who are passengers from the ports of other states is a different question, and involves very different considerations. It is not now before us; yet, in order to avoid misunderstanding, it is proper to say that, in my opinion, it cannot be maintained. Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States, from the most remote states or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every state and territory of the Union. And the various provisions in the constitution of the United States—such, for example, as the right to sue in a federal court sitting in another state, the right to pursue and reclaim one who has escaped from service, the equal privileges and immunities secured to citizens of other states, and the provision that vessels bound to or from one state to another shall not be obliged to enter and clear, or pay duties,—all prove that it intended to secure the freest intercourse between the citizens of the different states. For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states. And a tax imposed by a state for entering its territories or harbors is inconsistent with the rights which belong to the citizens of other states as members of the Union, and with the objects which that Union was intended to attain. Such a power in the states could produce nothing but discord and mutual irritation, and they very clearly do not possess it. But upon the question which the record brings up, the judgment in the New York case, as well as that from Massachusetts, ought, in my opinion, to be affirmed.

Dissenting opinions were rendered by JUSTICES DANIEL and WOODBURY.



## HENDERSON v. MAYOR OF NEW YORK—COMMISSIONERS OF IMMIGRATION v. NORTH GERMAN LLOYD.

(2 Otto, 259-275. 1875.)

APPEALS from the U. S. Circuit Court, Southern District of New York, and the District of Louisiana.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—In the case of *City of New York v. Miln*, reported in 11 Pet., 103 (§§ 1274-83, *supra*), the question of the constitutionality of a statute of the state concerning passengers in vessels coming to the port of New York was considered by this court. It was an act passed February 11, 1824, consisting of several sections. The first section, the only one passed upon by the court, required the master of every ship or vessel arriving in the port of New York from any country out of the United States, or from any other state of the United States, to make report in writing, and on oath, within twenty-four hours after his arrival, to the mayor of the city, of the name, place of birth, last legal settlement, age and occupation of every person brought as a passenger from any country out of the United States, or from any of the United States into the port of New York, or into any of the United States, and of all persons landed from the ship, or put on board, or suffered to go on board, any other vessel during the voyage, with intent of proceeding to the city of New York. A penalty was prescribed of \$75 for each passenger not so reported, and for every person whose name, place of birth, last legal settlement, age and occupation should be falsely reported.

The other sections required him to give bond, on the demand of the mayor, to save harmless the city from all expense of support and maintenance of such passenger, or to return any passenger, deemed liable to become a charge, to his last place of settlement; and required each passenger, not a citizen of the United States, to make report of himself to the mayor, stating his age, occupation, the name of the vessel in which he arrived, the place where he landed, and name of the commander of the vessel. We gather from the report of the case that the defendant *Miln* was sued for the penalties claimed for refusing to make the report required in the first section. A division of opinion was certified by the judges of the circuit court on the question whether the act assumes to regulate commerce between the port of New York and foreign ports, and is unconstitutional and void. This court, expressly limiting its decision to the first section of the act, held that it fell within the police powers of the states, and was not in conflict with the federal constitution. From this decision Mr. Justice Story dissented, and in his opinion stated that Chief Justice Marshall, who had died between the first and the second argument of the case, fully concurred with him in the view that the statute of New York was void, because it was a regulation of commerce forbidden to the states.

In the *Passenger Cases*, reported in 7 How., 283 (§§ 1284-1335, *supra*), the branch of the statute not passed upon in the preceding case came under consideration in this court. It was not the same statute, but was a law relating to the marine hospital on Staten Island. It authorized the health commissioner to demand, and, if not paid, to sue for and recover, from the master of every vessel arriving in the port of New York from a foreign port, \$1.50 for each cabin passenger, and \$1 for each steerage passenger, mate, sailor or mariner, and from the master of each coasting vessel twenty-five cents for each person on board. These moneys were to be appropriated to the use of the

hospital. The defendant Smith, who was sued for the sum of \$295 for refusing to pay for two hundred and ninety-five steerage passengers on board the British ship "Henry Bliss," of which he was master, demurred to the declaration on the ground that the act was contrary to the constitution of the United States and void. From a judgment against him, affirmed in the court of errors of the state of New York, he sued out a writ of error, on which the question was brought to this court. It was here held, at the January term, 1849, that the statute was "repugnant to the constitution and laws of the United States, and therefore void." 7 How., 572.

Immediately after this decision, the state of New York modified her statute on that subject, with a view, no doubt, to avoid the constitutional objection; and amendments and alterations have continued to be made up to the present time. As the law now stands, the master or owner of every vessel landing passengers from a foreign port is bound to make a report similar to the one recited in the statute held to be valid in the case of *New York v. Miln*; and on this report the mayor is to indorse a demand upon the master or owner that he give a bond for every passenger landed in the city, in the penal sum of \$300, conditioned to indemnify the commissioners of emigration, and every county, city and town in the state, against any expense for the relief or support of the person named in the bond for four years thereafter; but the owner or consignee may commute for such bond, and be released from giving it, by paying, within twenty-four hours after the landing of the passengers, the sum of \$1.50 for each one of them. If neither the bond be given nor the sum paid within the twenty-four hours, a penalty of \$500 for each pauper is incurred, which is made a lien on the vessel, collectible by attachment at the suit of the commissioner of emigration.

Conceding the authority of the Passenger Cases, which will be more fully considered hereafter, it is argued that the change in the statute now relied upon, requiring primarily a bond for each passenger landed, as an indemnity against his becoming a future charge to the state or county, leaving it optional with the ship-owner to avoid this by paying a fixed sum for each passenger, takes it out of the principle of the case of *Smith v. Turner*,—the Passenger Case from New York. It is said that the statute in that case was a direct tax on the passenger, since the act authorized the ship-master to collect it of him, and that on that ground alone was it held void; while in the present case the requirement of the bond is but a suitable regulation under the power of the state to protect its cities and towns from the expense of supporting persons who are paupers or diseased, or helpless women and children, coming from foreign countries.

§ 1336. *Purpose of a statute to be determined from its natural effect.*

In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases.

§ 1337. *A statute construed to impose a tax on passengers.*

To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum. To suppose that a vessel, which once a

month lands from three hundred to one thousand passengers, or from three thousand to twelve thousand per annum, will give that many bonds of \$300 with good sureties, with a covenant for four years, against accident, disease or poverty of the passenger named in such bond, is absurd, when this can be avoided by the payment of \$1.50 collected of the passenger before he embarks on the vessel. Such bonds would amount in many instances, for every voyage, to more than the value of the vessel. The liability on the bond would be, through a long lapse of time, contingent on circumstances which the bondsman could neither foresee nor control. The cost of preparing the bond and approving sureties, with the trouble incident to it in each case, is greater than the sum required to be paid as commutation. It is inevitable, under such a law, that the money would be paid for each passenger, or the statute resisted or evaded. It is a law in its purpose and effect imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries. It is said that the purpose of the act is to protect the state against the consequences of the flood of pauperism immigrating from Europe and first landing in that city. But it is a strange mode of doing this, to tax every passenger alike who comes from abroad. The man who brings with him important additions to the wealth of the country, and the man who is perfectly free from disease, and brings to aid the industry of the country a stout heart and a strong arm, are as much the subject of the tax as the diseased pauper who may become the object of the charity of the city the day after he lands from the vessel. No just rule can make the citizen of France landing from an English vessel on our shore liable for the support of an English or Irish pauper who lands at the same time from the same vessel.

§ 1338. *Passenger Cases criticised.*

So far as the authority of the cases of *New York v. Miln* and *Passenger Cases* can be received as conclusive, they decide that the requirement of a catalogue of passengers, with statements of their last residence, and other matters of that character, is a proper exercise of state authority, and that the requirement of the bond, or the alternative payment of money for each passenger, is void, because forbidden by the constitution and laws of the United States. But the *Passenger Cases* (so called because a similar statute of the state of Massachusetts was the subject of consideration at the same term with that of New York) were decided by a bare majority of the court. Justices McLean, Wayne, Catron, McKinley and Grier held both statutes void, while Chief Justice Taney and Justices Daniel, Nelson and Woodbury held them valid. Each member of the court delivered a separate opinion, giving the reasons for his judgment, except Judge Nelson, none of them professing to be the authoritative opinion of the court. Nor is there to be found, in the reasons given by the judges who constituted the majority, such harmony of views as would give that weight to the decision which it lacks by reason of the divided judgments of the members of the court. Under these circumstances, with three cases before us arising under statutes of three different states on the same subject, which have been discussed as though open in this court to all considerations bearing upon the question, we approach it with the hope of attaining a unanimity not found in the opinions of our predecessors.

As already indicated, the provisions of the constitution of the United States, on which the principal reliance is placed to make void the statute of New York, is that which gives to congress the power "to regulate commerce with foreign nations." As was said in *United States v. Holliday*, 3 Wall., 417, "commerce

with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments." It means trade and it means intercourse. It means commercial intercourse between nations, and parts of nations, in all its branches. It includes navigation, as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. "The mind," says the great chief justice, "can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of another;" and he might have added, with equal force, which prescribed no terms for the admission of their cargo or their passengers. *Gibbons v. Ogden*, 9 Wheat., 190 (§§ 1183-1201, *supra*).

§ 1839. *A state law regulating the landing of passengers is a regulation of commerce.*

Since the delivery of the opinion in that case, which has become the accepted canon of construction of this clause of the constitution, as far as it extends, the transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportion at that time to other branches of commerce. It has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders. In addition to the wealth which some of them bring, they bring still more largely the labor which we need to till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufactures and its agriculture. Is the regulation of this great system a regulation of commerce? Can it be doubted that a law which prescribes the terms on which vessels shall engage in it is a law regulating this branch of commerce? The transportation of a passenger from Liverpool to the city of New York is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city. A law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations.

§ 1840. *A state cannot exercise its police power in regard to matters confided exclusively to congress by the constitution.*

The accuracy of these definitions is scarcely denied by the advocates of the state statutes. But assuming that, in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the states, and that among these powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character, they insist that the power here exercised falls within this class, and belongs rightfully to the states. This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of congress by the constitution.

Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency and for the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

But, however difficult this may be, it is clear from the nature of our complex form of government, that, whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states. "It has been contended," says Marshall, C. J., "that if a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject and each other like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it by declaring the supremacy, not only of itself, but of the laws made in pursuance thereof. The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is supreme." Where the federal government has acted, he says, "In every such case the act of congress or the treaty is supreme; and the laws of the state, though enacted in the exercise of powers not controverted, must yield to it." 9 Wheat., 210.

§ 1341. *Whatever subjects are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress.*

It is said, however, that, under the decisions of this court, there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the state, and its legislation be valid so long as it interferes with no act of congress, or treaty of the United States. Such a proposition is supported by the opinions of several of the judges in the Passenger Cases; by the decisions of this court in *Cooley v. Board of Wardens*, 12 How., 299 (§§ 1541-47, *infra*), and by the cases of *Crandall v. State of Nevada*, 6 Wall., 35 (§§ 1269-73, *supra*), and *Gilman v. Philadelphia*, 3 Wall., 713 (§§ 1164-70, *supra*). But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree that, under the commerce clause of the constitution, or within its compass, there are powers which, from their nature, are exclusive in congress; and, in the case of *Cooley v. Board of Wardens*, it was said that "whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress." A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this; for it may properly be called *international*. It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no

doubt that such a treaty would fall within the power conferred on the president and the senate by the constitution. It is in fact, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the rule be established by treaty or by legislation.

It is equally clear that the matter of these statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans and San Francisco. A striking evidence of the truth of this proposition is to be found in the similarity, we might almost say in the identity, of the statutes of New York, of Louisiana and California, now before us for consideration in these three cases. It is apparent, therefore, that, if there be a class of laws which may be valid when passed by the states until the same ground is occupied by a treaty or an act of congress, this statute is not of that class.

§ 1342. *The mere fact that the law in question was not to operate until twenty-four hours after landing of passengers does not affect the case.*

The argument has been pressed with some earnestness, that inasmuch as this statute does not come into operation until twenty-four hours after the passenger has landed, and has mingled with, or has the right to mingle with, the mass of the population, he is withdrawn from the influence of any laws which congress might pass on the subject, and remitted to the laws of the state as its own citizens are. It might be a sufficient answer to say that this is a mere evasion of the protection which the foreigner has a right to expect from the federal government when he lands here a stranger, owing allegiance to another government, and looking to it for such protection as grows out of his relation to that government.

But the branch of the statute which we are considering is directed to and operates directly on the ship-owner. It holds him responsible for what he has done before the twenty-four hours commence. He is to give the bond or pay the money because he *has* landed the passenger, and he is given twenty-four hours' time to do this before the penalty attaches. When he is sued for this penalty, it is not because the man has been here twenty-four hours, but because he brought him here, and failed to give the bond or pay \$1.50. The effective operation of this law commences at the other end of the voyage. The master requires of the passenger, before he is admitted on board, as a part of the passage money, the sum which he knows he must pay for the privilege of landing him in New York. It is, as we have already said, in effect, a tax on the passenger, which he pays for the right to make the voyage,—a voyage only completed when he lands on the American shore. The case does not even require us to consider at what period after his arrival the passenger himself passes from the sole protection of the constitution, laws and treaties of the United States, and becomes subject to such laws as the state may rightfully pass, as was the case in regard to importations of merchandise in *Brown v. State of Maryland*, 12 Wheat., 417 (§§ 1466–70, *infra*), and in the *License Cases*, 5 How., 504 (§§ 1481–1518, *infra*). It is too clear for argument that this demand of the owner of the vessel for a bond or money on account of every passenger landed by him from a foreign shore is, if valid, an obligation which he incurs by bringing the passenger here, and which is perfect the moment he leaves the vessel.

We are of opinion that this whole subject has been confided to congress by the constitution; that congress can more appropriately and with more accept-

ance exercise it than any other body known to our law, state or national; that by providing a system of laws in these matters, applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled. Whether, in the absence of such action, the states can, or how far they can, by appropriate legislation, protect themselves against *actual* paupers, vagrants, criminals and diseased persons, arriving in their territory from foreign countries, we do not decide. The portions of the New York statute which concern persons who, on inspection, are found to belong to these classes, are not properly before us, because the relief sought is to the part of the statute applicable to all passengers alike, and is the only relief which can be given on this bill.

The decree of the circuit court of New York, in the case of *Henderson v. Mayor of City of New York*, is reversed and the case remanded, with direction to enter a decree for an injunction in accordance with this opinion. The statute of Louisiana, which is involved in the case of *Commissioners of Immigration v. North German Lloyd*, is so very similar to, if not an exact copy of, that of New York, as to need no separate consideration. In this case the relief sought was against exacting the bonds or paying the commutation money as to all passengers, which relief the circuit court granted by an appropriate injunction, and the decree in that case is accordingly affirmed.

CHY LUNG v. FREEMAN.

(2 Otto, 275-281. 1875.)

ERROR to the Supreme Court of California.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.— While this case presents for our consideration the same class of state statutes considered in *Henderson v. Mayor of New York*, and *Commissioners of Immigration v. North German Lloyd*, 2 Otto, 259 (§§ 1336-42, *supra*), it differs from them in two very important points. These are, *First*, The plaintiff in error was a passenger on a vessel from China, being a subject of the emperor of China, and is held a prisoner because the owner or master of the vessel who brought her over refused to give a bond in the sum of \$500 in gold, conditioned to indemnify all the counties, towns and cities of California against liability for her support or maintenance for two years. *Secondly*, The statute of California, unlike those of New York and Louisiana, does not require a bond for *all* passengers landing from a foreign country, but only for classes of passengers specifically described, among which are "lewd and debauched women," to which class it is alleged plaintiff belongs.

The plaintiff, with some twenty other women, on the arrival of the steamer "Japan" from China, was singled out by the commissioner of immigration, an officer of the state of California, as belonging to that class, and the master of the vessel required to give the bond prescribed by law before he permitted them to land. This he refused to do and detained them on board. They sued out a writ of *habeas corpus*, which by regular proceedings resulted in their committal, by order of the supreme court of the state, to the custody of the sheriff of the county and city of San Francisco, to await the return of the "Japan," which had left the port pending the progress of the case; the order being to remand them to that vessel on her return, to be removed from the state.

All of plaintiff's companions were released from the custody of the sheriff on a writ of *habeas corpus* issued by Mr. Justice Field of this court. But

plaintiff by a writ of error brings the judgment of the supreme court of California to this court, for the purpose, as we suppose, of testing the constitutionality of the act under which she is held a prisoner. We regret very much that while the attorney-general of the United States has deemed the matter of such importance as to argue it in person, there has been no argument in behalf of the state of California, the commissioner of immigration, or the sheriff of San Francisco, in support of the authority by which plaintiff is held a prisoner; nor have we been furnished even with a brief in support of the statute of that state.

It is a most extraordinary statute. It provides that the commissioner of immigration is "to satisfy himself whether or not any passenger who shall arrive in the state by vessels from any foreign port or place (who is not a citizen of the United States) is lunatic, idiotic, deaf, dumb, blind, crippled or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become a public charge, or has been a pauper in any other country, or is, from sickness or disease (existing either at the time of sailing from the port of departure or at the time of his arrival in the state), a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman;" and no such person shall be permitted to land from the vessel, unless the master or owner or consignee shall give a separate bond in each case, conditioned to save harmless every county, city and town of the state against any expense incurred for the relief, support or care of such person for two years thereafter.

The commissioner is authorized to charge the sum of seventy-five cents for every examination of a passenger made by him; which sum he may collect of the master, owner or consignee, or of the vessel by attachment. The bonds are to be prepared by the commissioner, and two sureties are required to each bond; and for preparing the bond the commissioner is allowed to charge and collect a fee of \$3; and for each oath administered to a surety, concerning his sufficiency as such, he may charge \$1. It is expressly provided that there shall be a separate bond for each passenger; that there shall be two sureties on each bond, and that the same sureties must not be on more than one bond; and they must in all cases be residents of the state. If the ship-master or owner prefers, he may commute for these bonds by paying such a sum of money as the commissioner may in each case think proper to exact; and after retaining twenty per cent. of the commutation money for his services, the commissioner is required once a month to deposit the balance with the treasurer of the state. See ch. 1, art. 7, of the Political Code of California, as modified by sec. 70 of the amendments of 1873, 1874.

§ 1343. *Law requiring an indemnity prior to the landing of passengers supposed to be insane, paupers, etc., a regulation of commerce.*

It is hardly possible to conceive a statute more skilfully framed, to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind. The commissioner has but to go aboard a vessel filled with passengers ignorant of our language and our laws, and without trial or hearing or evidence, but from the external appearances of persons with whose former habits he is unfamiliar, to point with his finger to twenty, as in this case, or a hundred if he chooses, and say to the master, "these are idiots, these are paupers, these are convicted criminals, these are lewd women, and these others are debauched women. I have here a hundred blank forms of bonds printed. I require you to fill me up and sign each of these for \$500 in



gold, and that you furnish me two hundred different men, residents of this state, and of sufficient means, as sureties on these bonds. I charge you \$5 in each case for preparing the bond and swearing your sureties; and I charge you seventy-five cents each for examining these passengers and all others you have on board. If you don't do this, you are forbidden to land your passengers under a heavy penalty. But I have the power to commute with you for all this for any sum I may choose to take in cash. I am open to an offer; for you must remember that twenty per cent. of all I can get out of you goes into my own pocket and the remainder into the treasury of California."

If, as we have endeavored to show in the opinion in the preceding cases, (a) we are at liberty to look to the effect of a statute for the test of its constitutionality, the argument need go no further. But we have thus far only considered the effect of the statute on the owner of the vessel. As regards the passengers, section 2963 declares that consuls, ministers, agents or other public functionaries, of any foreign government, arriving in this state in their *official capacity*, are exempt from the provisions of this chapter. All other passengers are subject to the order of the commissioner of immigration. Individual foreigners, however distinguished at home for their social, their literary or their political character, are helpless in the presence of this potent commissioner. Such a person may offer to furnish any amount of surety on his own bond, or deposit any sum of money; but the law of California takes no note of him. It is the master, owner or consignee of the vessel alone whose bond can be accepted; and so a silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend.

While the occurrence of the hypothetical case just stated may be highly improbable, we venture the assertion that, if citizens of our own government were treated by any foreign nation as subjects of the emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress. Or, if this plaintiff and her twenty companions had been subjects of the queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the state of California; for, by our constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the federal government? If that government has forbidden the states to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the constitution, which provides for this, done so foolish a thing as to leave it in the power of the states to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the states the acts for which it is held responsible?

§ 1344. *The passage of laws which concern the admission of citizens and subjects of foreign nations belongs to congress and not to the states.*

The constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of foreign nations

(a) *Henderson v. Mayor of New York*, §§ 1333-42, *supra*.

to our shores belongs to congress, and not to the states. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single state can, at her pleasure, embroil us in disastrous quarrels with other nations.

We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a state statute, limited to provisions necessary and appropriate to that object alone, shall, in a proper controversy, come before us, it will be time enough to decide that question. The statute of California goes so far beyond what is necessary, or even appropriate, for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified. Its manifest purpose, as we have already said, is, not to obtain indemnity, but money.

The amount to be taken is left in every case to the discretion of an officer, whose cupidity is stimulated by a reward of one-fifth of all he can obtain. The money, when paid, does not go to any fund for the benefit of immigrants, but is paid into the general treasury of the state, and devoted to the use of all her indigent citizens. The blind, or the deaf, or the dumb passenger is subject to contribution, whether he be a rich man or a pauper. The patriot, seeking our shores after an unsuccessful struggle against despotism in Europe or Asia, may be kept out because there his resistance has been adjudged a crime. The woman whose error has been repaired by a happy marriage and numerous children, and whose loving husband brings her with his wealth to a new home, may be told she must pay a round sum before she can land, because it is alleged that she was debauched by her husband before marriage. Whether a young woman's manners are such as to justify the commissioner in calling her lewd may be made to depend on the sum she will pay for the privilege of landing in San Francisco. It is idle to pursue the criticism. In any view which we can take of this statute, it is in conflict with the constitution of the United States, and therefore void.

Judgment reversed, and the case remanded, with directions to make an order discharging the prisoner from custody.

**§ 1845. Tax on interstate commerce.**—While a state may tax the gross receipts of a corporation within the state, it cannot compel a foreign corporation to pay a tax upon transportation of passengers or goods from a point without the state to a point beyond the state, and merely conducted through the state. Such a tax is a tax upon interstate commerce, although the tax exacted is only upon the proportion that the distance within the state bears to the whole. A law requiring railroad corporations to make returns of their receipts from such transportation, under penalty for neglect, is unconstitutional. *State of Indiana v. American Express Co.*, \* 7 Biss., 227. See § 1244.

**§ 1846. Tax on locomotives.**—A tax or license fee, imposed for the use within the state of each locomotive and car used by a railway company within the state, is a regulation by a state of commerce between states, and is unconstitutional, when it appears that such locomotives and cars are mainly employed in transporting persons and property through the state from other states, or into it, or out of it. *Minot v. Philadelphia, etc., R'y Co.*, 2 Abb., 339.

#### 4. *Regulating Charges for the Use of Private Property.*

**SUMMARY** — *Regulating charges by warehousemen, § 1347. — Requiring railroad companies to adopt rates of fare and freight, § 1348.*

§ 1347. A law regulating the charges by a warehouseman for storing grain, although some of the grain stored by him may be intended for shipment to foreign states or nations, does not infringe upon the exclusive power of congress to regulate commerce, in the absence of congressional legislation upon the subject. *Munn v. Illinois*, §§ 1349-67.

§ 1348. A statute of a state required railroad companies annually to fix rates of fare and freight, and to cause a copy of the schedule to remain posted at each station during the year; and for wilfully neglecting so to do, or for receiving higher rates of fare or freight than those posted, the companies were made liable to the persons injured. *Held*, that the statute was merely a police regulation, and not repugnant to the commerce clause of the constitution. *Railroad Co. v. Fuller*, §§ 1368-70.

[NOTES.— See § 1371.]

#### MUNN v. ILLINOIS.

(4 Otto, 113-154. 1876.)

ERROR to the Supreme Court of Illinois.

Opinion by WAITE, C. J.

**STATEMENT OF FACTS.**— The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the state having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant: 1. To that part of section 8, article 1, of the constitution of the United States which confers upon congress the power "to regulate commerce with foreign nations and among the several states." 2. To that part of section 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another;" and 3. To that part of amendment 14 which ordains that no state shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

§ 1349. *Every statute is presumed to be constitutional, and the court should not declare it unconstitutional unless it is clearly so.*

We will consider the last of these objections first. Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained. The constitution contains no definition of the word "deprive," as used in the fourteenth amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection. While this provision of the amendment is new in the constitution of the United States, as a limitation upon the powers of the states, it is old as a principle of civilized government. It is found in Magna Charta, and in substance, if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union. By the fifth amendment it was introduced into the con-

stitution of the United States as a limitation upon the powers of the national government, and by the fourteenth as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states.

§ 1350. *Reserved powers of the states.*

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British parliament, and through their state constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective states, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the states and of the people of the states was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the governments of the states possess all the powers of the parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

§ 1351. *Source of police powers; rights of a member of society.*

When one becomes a member of society he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private (*Thorpe v. Rutland & B. R. Co.*, 27 Vt., 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non lædas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How., 583 (§§ 1481–1518, *infra*), "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold. To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the fifth amendment in force, congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread" (3 Stat., 587, sec. 7); and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the

same, and the rates of hauling by cartmen, wagoners, carmen and draymen, and the rates of commission of auctioneers." 9 id., 224, sec. 2.

§ 1852. *Regulating the use of private property in which the public has an interest is not a deprivation of property without due process of law.*

From this it is apparent that, down to the time of the adoption of the fourteenth amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the states from doing that which will operate as such a deprivation. This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Thus, as to ferries, Lord Hale says, in his treatise *De Jure Maris*, 1 Harg. Law Tracts, 6, the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable." So if one owns the soil and landing-places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but for the protection of the people and the promotion of the general welfare.

And, again, as to wharves and wharfingers, Lord Hale, in his treatise *De Portibus Maris*, already cited, says: "A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. . . . If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for

the purpose, because they are the wharfs only licensed by the king, . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected, in that case there cannot be taken arbitrary and excessive duties for crannage, wharfage, pesage, etc.; neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest."

This statement of the law by Lord Hale was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century in *Bolt v. Stennett*, 8 Term R., 606.

And the same has been held as to warehouses and warehousemen. In *Aldnutt v. Inglis*, 12 East, 527, decided in 1810, it appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing act, to receive wines from importers before the duties upon the importation were paid; and the question was whether they could charge arbitrary rates for such storage, or must be content with a reasonable compensation. Upon this point Lord Ellenborough said (p. 537): "There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is whether, circumstanced as this company is, by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf."

And further on (p. 539): "It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to [that from *De Portibus Maris* already quoted], which includes the good sense as well as the law of the subject."

And in the same case *Le Blanc, J.*, said (p. 541): "Then, admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance, yet having, as they now have, this monopoly, the question is whether the warehouses be not private property clothed with a public right, and, if so, the principle of law attaches upon them. The privilege, then, of bonding these wines being at present confined by the act of parliament to the company's warehouses, is it not the privilege of the public, and shall not that

which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but a reasonable rent? But upon this record the company resist having their demand for warehouse rent confined within any limit; and, though it does not follow that the rent in fact fixed by them is unreasonable, they do not choose to insist on its being reasonable for the purpose of raising the question. For this purpose, therefore, the question may be taken to be whether they may claim an unreasonable rent. But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be *juris privati* only; and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."

We have quoted thus largely the words of these eminent expounders of the common law, because, as we think, we find in them the principle which supports the legislation we are now examining. Of Lord Hale it was once said by a learned American judge: "In England, even on rights of prerogative, they scan his words with as much care as if they had been found in Magna Charta; and the meaning once ascertained, they do not trouble themselves to search any further." 6 Cow. (N. Y.), 536, note.

In later times, the same principle came under consideration in the supreme court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive . . . for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this state, tavern-keepers are licensed; . . . and the county court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads and other kindred subjects." *Mobile v. Yuille*, 3 Ala. (N. S.), 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit: "And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," etc. 3 W. & M., ch. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., 382 (CARRIERS, §§ 220-242). Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated. But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

§ 1353. *Elevators for the handling of grain for toll are constructed for the public use, and are subject to public regulation.*

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the west and northwest sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the great lakes, and some of it is forwarded by railway to the eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great states of the west with four or five of the states lying on the sea-shore, and forms the largest part of interstate commerce in these states. The grain warehouses or elevators in Chicago are immense structures, holding from three hundred thousand to one million bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great states of the west" must pass on the way "to four or five of the states on the sea-shore" may be a "virtual" monopoly. Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and



exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he . . . take but reasonable toll." Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts.

§ 1354. *When a matter is within the scope of legislative power, but the exercise of such power depends upon expediency, the legislature is the exclusive judge of the propriety of legislative interference.*

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers and receivers of grain and produce" (article 13, section 7); and by section 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, etc., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist, when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

§ 1355. *Principles on which charges for the use of property may be regulated.*

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

§ 1356. *The fact that warehouses were built at the time statutes were passed regulating charges by their owners does not take them out of the operation of the statutes.*

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were

adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

§ 1357. *The question as to what is a reasonable compensation for the use of property is legislative as well as judicial.*

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps, more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

§ 1358. *Rights of property created by common law cannot be taken away without due process of law; but the law itself may be changed at the will of the legislature, unless prevented by constitutional limitations.*

But a mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one. We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

§ 1359. *The mere fact that a statute regulating charges is confined to large cities does not lay it open to the objection that it denies to the owners of the warehouses regulated "equal protection of the laws."*

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the fourteenth amendment which is relied upon, viz., that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the state from regulating the fares of hackmen, or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

§ 1360. *A law regulating charges by warehousemen is not necessarily repugnant to the commerce clause of the constitution.*

We come now to consider the effect upon this statute of the power of congress to regulate commerce. It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wall., 293 (§§ 1263-64, *supra*), that "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the state of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a state, under the form of regulating its own affairs, has encroached upon the exclusive domain of congress in respect to interstate commerce, but we do say that upon the facts as they are represented to us in this record, that has not been done.

§ 1361. *Giving preference to the ports of a state.*

The remaining objection, to wit, that the statute in its present form is repugnant to section 9, article 1, of the constitution of the United States, because it gives preference to the ports of one state over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of congress, and in no respect affects the states in the regulation of their domestic affairs. We conclude, therefore, that the statute in question is not repugnant to the constitution of the United States, and that there is no error in the judgment. In passing upon this case we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

*Judgment affirmed.*

Dissenting opinion by MR. JUSTICE FIELD, MR. JUSTICE STRONG concurring.

I am compelled to dissent from the decision of the court in this case, and from the reasons upon which that decision is founded. The principle upon which

the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference, and is in conflict with the authorities cited in its support. The defendants had constructed their warehouse and elevator in 1862 with their own means, upon ground leased by them for that purpose, and from that time until the filing of the information against them had transacted the business of receiving and storing grain for hire. The rates of storage charged by them were annually established by arrangement with the owners of different elevators in Chicago, and were published in the month of January. In 1870 the state of Illinois adopted a new constitution, and by it "all elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses."

In April, 1871, the legislature of the state passed an act to regulate these warehouses, thus declared to be public, and the warehousing and inspection of grain, and to give effect to this article of the constitution. By that act public warehouses, as defined in the constitution, were divided into three classes, the first of which embraced all warehouses, elevators or granaries located in cities having not less than one hundred thousand inhabitants, in which grain was stored in bulk, and the grain of different owners was mixed together, or stored in such manner that the identity of different lots or parcels could not be accurately preserved. To this class the elevator of the defendants belonged. The act prescribed the maximum of charges which the proprietor, lessee or manager of the warehouse was allowed to make for storage and handling of grain, including the cost of receiving and delivering it, for the first thirty days or any part thereof, and for each succeeding fifteen days or any part thereof; and it required him to procure from the circuit court of the county a license to transact business as a public warehouseman, and to give a bond to the people of the state in the penal sum of \$10,000 for the faithful performance of his duty as such warehouseman of the first class, and for his full and unre-served compliance with all laws of the state in relation thereto. The license was made revocable by the circuit court upon a summary proceeding for any violation of such laws. And a penalty was imposed upon every person trans-acting business as a public warehouseman of the first class, without first pro-curing a license, or continuing in such business after his license had been revoked, of not less than \$100 or more than \$500 for each day on which the business was thus carried on. The court was also authorized to refuse for one year to renew the license, or to grant a new one to any person whose license had been revoked. The maximum of charges prescribed by the act for the receipt and storage of grain was different from that which the defendants had previously charged, and which had been agreed to by the owners of the grain. More extended periods of storage were required of them than they formerly gave for the same charges. What they formerly charged for the first twenty days of storage, the act allowed them to charge only for the first thirty days of storage; and what they formerly charged for each succeeding ten days after the first twenty, the act allowed them to charge only for each succeeding fifteen days after the first thirty. The defendants, deeming that they had a right to use their own property in such manner as they desired, not inconsistent with the equal right of others to a like use, and denying the power of the legislature to fix prices for the use of their property, and their services in connection with it, refused to comply with the act by taking out the license and giving the bond

required, but continued to carry on the business and to charge for receiving and storing grain such prices as they had been accustomed to charge, and as had been agreed upon between them and the owners of the grain. For thus transacting their business without procuring a license, as required by the act, they were prosecuted and fined, and the judgment against them was affirmed by the supreme court of the state. The question presented, therefore, is one of the greatest importance — whether it is within the competency of a state to fix the compensation which an individual may receive for the use of his own property in his private business, and for his services in connection with it.

§ 1362. *The mere declaration of the state through its constitution, that certain business is public, does not make it so.*

The declaration of the constitution of 1870, that private buildings used for private purposes shall be deemed public institutions, does not make them so. The receipt and storage of grain in a building erected by private means for that purpose does not constitute the building a public warehouse. There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted. A tailor's or a shoemaker's shop would still retain its private character, even though the assembled wisdom of the state should declare, by organic act or legislative ordinance, that such a place was a public workshop, and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors, by giving them a new designation. The defendants were no more public warehousemen, as justly observed by counsel, than the merchant who sells his merchandise to the public is a public merchant, or the blacksmith who shoes horses for the public is a public blacksmith; and it was a strange notion that by calling them so they would be brought under legislative control. The supreme court of the state — divided, it is true, by three to two of its members — has held that this legislation was a legitimate exercise of state authority over private business; and the supreme court of the United States, two only of its members dissenting, has decided that there is nothing in the constitution of the United States, or its recent amendments, which impugns its validity. It is, therefore, with diffidence I presume to question the soundness of the decision.

§ 1363. *The fourteenth amendment to the federal constitution is violated as well by depriving a person of the use or profits of his property as by depriving him of his title or possession thereof.*

The validity of the legislation was, among other grounds, assailed in the state court as being in conflict with that provision of the state constitution which declares that no person shall be deprived of life, liberty or property without due process of law, and with that provision of the fourteenth amendment of the federal constitution which imposes a similar restriction upon the action of the state. The state court held, in substance, that the constitutional provision was not violated so long as the owner was not deprived of the title and possession of his property; and that it did not deny to the legislature the power to make all needful rules and regulations respecting the use and enjoyment of the property, referring, in support of the position, to instances of its action in prescribing the interest on money, in establishing and regulating public ferries and public mills, and fixing the compensation in the shape of tolls, and in delegating power to municipal bodies to regulate the charges of hackmen and draymen, and the weight and price of bread. In this court the legislation was also

assailed on the same ground, our jurisdiction arising upon the clause of the fourteenth amendment ordaining that no state shall deprive any person of life, liberty or property without due process of law. But it would seem from its opinion that the court holds that property loses something of its private character when employed in such a way as to be generally useful. The doctrine declared is that property "becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large;" and from such clothing the right of the legislature is deduced to control the use of the property, and to determine the compensation which the owner may receive for it. When Sir Matthew Hale, and the sages of the law in his day, spoke of property as affected by a public interest, and ceasing from that cause to be *juris privati* solely, that is, ceasing to be held merely in private right, they referred to property dedicated by the owner to public uses, or to property the use of which was granted by the government, or in connection with which special privileges were conferred. Unless the property was thus dedicated, or some right bestowed by the government was held with the property, either by specific grant or by prescription of so long a time as to imply a grant originally, the property was not affected by any public interest so as to be taken out of the category of property held in private right. But it is not in any such sense that the terms "clothing property with a public interest" are used in this case. From the nature of the business under consideration—the storage of grain—which, in any sense in which the words can be used, is a private business, in which the public are interested only as they are interested in the storage of other products of the soil, or in articles of manufacture, it is clear that the court intended to declare that, whenever one devotes his property to a business which is useful to the public,— "affects the community at large,"—the legislature can regulate the compensation which the owner may receive for its use, and for his own services in connection with it. "When, therefore," says the court, "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." The building used by the defendants was for the storage of grain: in such storage, says the court, the public has an interest; therefore the defendants, by devoting the building to that storage, have granted the public an interest in that use, and must submit to have their compensation regulated by the legislature.

If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the constitution against such invasion of private rights, all property and all business in the state are held at the mercy of a majority of its legislature. The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, anything like so great an interest; and, according to the doctrine announced, the legislature may fix the rent of all tenements used for residences, without reference to the cost of their erection. If the owner does not like the rates prescribed, he may cease renting his houses. He has granted to the public, says the court, an interest in the use of the buildings, and "he may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." The

public is interested in the manufacture of cotton, woolen and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States.

The doctrine of the state court, that no one is deprived of his property, within the meaning of the constitutional inhibition, so long as he retains its title and possession, and the doctrine of this court, that, whenever one's property is used in such a manner as to affect the community at large, it becomes, by that fact, clothed with a public interest, and ceases to be *juris privati* only, appear to me to destroy, for all useful purposes, the efficacy of the constitutional guaranty. All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received. Unless I have misread the history of the provision now incorporated into all our state constitutions, and by the fifth and fourteenth amendments into our federal constitution, and have misunderstood the interpretation it has received, it is not thus limited in its scope, and thus impotent for good. It has a much more extended operation than either court, state or federal, has given to it. The provision, it is to be observed, places property under the same protection as life and liberty. Except by due process of law, no state can deprive any person of either. The provision has been supposed to secure to every individual the essential conditions for the pursuit of happiness; and for that reason has not been heretofore, and should never be, construed in any narrow or restricted sense.

No state "shall deprive any person of life, liberty or property without due process of law," says the fourteenth amendment to the constitution. By the term "life," as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to every one with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision. By the term "liberty," as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment.

§ 1364. *The right of a state to determine the uses to which private property shall be devoted, or the prices to be paid the owner for such uses, without his consent, is equivalent to a right to deprive the owner of his property.*

The same liberal construction which is required for the protection of life and liberty, in all particulars in which life and liberty are of any value, should be applied to the protection of private property. If the legislature of a state, under pretense of providing for the public good, or for any other reason, can determine, against the consent of the owner, the uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special act for its confiscation or destruction. If, for instance, the owner is prohibited from using his building for the purposes for which it was designed, it is of little consequence that he is permitted to retain the title and possession; or, if he is compelled to take as compensation for its use less than the expenses to which he is subjected by its ownership, he is, for all practical purposes, deprived of the property, as effectually as if the legislature had ordered his forcible dispossession. If it be admitted that the legislature has any control over the compensation, the extent of that compensation becomes a mere matter of legislative discretion. The amount fixed will operate as a partial destruction of the value of the property, if it fall below the amount which the owner would obtain by contract, and, practically, as a complete destruction, if it be less than the cost of retaining its possession. There is, indeed, no protection of any value under the constitutional provision, which does not extend to the use and income of the property, as well as to its title and possession.

This court has heretofore held in many instances that a constitutional provision intended for the protection of rights of private property should be liberally construed. It has so held in the numerous cases where it has been called upon to give effect to the provision prohibiting the states from legislation impairing the obligation of contracts; the provision being construed to secure from direct attack not only the contract itself, but all the essential incidents which give it value and enable its owner to enforce it. Thus, in *Bronson v. Kinzie*, reported in 1 How., 311 (§§ 1650-55, *infra*), it was held that an act of the legislature of Illinois, giving to a mortgagor twelve months within which to redeem his mortgaged property from a judicial sale, and prohibiting its sale for less than two-thirds of its appraised value, was void as applied to mortgages executed prior to its passage. It was contended, in support of the act, that it affected only the remedy of the mortgagee, and did not impair the contract; but the court replied that there was no substantial difference between a retrospective law declaring a particular contract to be abrogated and void, and one which took away all remedy to enforce it, or incumbered the remedy with conditions that rendered it useless or impracticable to pursue it. And, referring to the constitutional provision, the court said, speaking through Mr. Chief Justice Taney, that "it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which



would render this provision illusive and nugatory, mere words of form, affording no protection and producing no practical result."

And in *Pumpelly v. Green Bay Co.*, 13 Wall., 177, the language of the court is equally emphatic. That case arose in Wisconsin, the constitution of which declares, like the constitutions of nearly all the states, that private property shall not be taken for public use without just compensation; and this court held that the flooding of one's land by a dam constructed across a river under a law of the state was a taking within the prohibition, and required compensation to be made to the owner of the land thus flooded. The court, speaking through Mr. Justice Miller, said: "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction on the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

The views expressed in these citations, applied to this case, would render the constitutional provision invoked by the defendants effectual to protect them in the uses, income and revenues of their property, as well as in its title and possession. The construction actually given by the state court and by this court makes the provision, in the language of Taney, a protection to "a mere barren and abstract right, without any practical operation upon the business of life," and renders it "illusive and nugatory, mere words of form, affording no protection and producing no practical result."

The power of the state over the property of the citizen under the constitutional guaranty is well defined. The state may take his property for public uses, upon just compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property, so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. The doctrine that each one must so use his own as not to injure his neighbor — *sic utere tuo ut alienum non lædas* — is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of state authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the state over the property of the citizen does not extend beyond such limits.

§ 1365. *The regulation of the amount of compensation an owner of property shall receive for its use is entirely independent of and does not belong to the police powers of a state.*

It is true that the legislation which secures to all protection in their rights,

and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals and health of the community comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the state, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose. If one construct a building in a city, the state, or the municipality exercising a delegated power from the state, may require its walls to be of sufficient thickness for the uses intended; it may forbid the employment of inflammable materials in its construction, so as not to endanger the safety of his neighbors; if designed as a theater, church, or public hall, it may prescribe ample means of egress, so as to afford facility for escape in case of accident; it may forbid the storage in it of powder, nitro-glycerine, or other explosive material; it may require its occupants daily to remove decayed vegetable and animal matter, which would otherwise accumulate and engender disease; it may exclude from it all occupations and business calculated to disturb the neighborhood or infect the air. Indeed, there is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety and health of the community, thus securing to all the equal enjoyment of their property; but in establishing these regulations it is evident that compensation to the owner for the use of his property, or for his services in union with it, is not a matter of any importance; whether it be one sum or another does not affect the regulation, either in respect to its utility or mode of enforcement. One may go, in like manner, through the whole round of regulations authorized by legislation, state or municipal, under what is termed the police power, and in no instance will he find that the compensation of the owner for the use of his property has any influence in establishing them.

§ 1366. *When compensation for the use of property is a subject of regulation.*

It is only where some right or privilege is conferred by the government or municipality upon the owner, which he can use in connection with his property, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant, and the state, in exercising its power of prescribing the compensation, only determines the conditions upon which its concession shall be enjoyed. When the privilege ends, the power of regulation ceases.

Jurists and writers on public law find authority for the exercise of this police power of the state, and the numerous regulations which it prescribes, in the doctrine already stated, that every one must use and enjoy his property consistently with the rights of others, and the equal use and enjoyment by them of their property. "The police power of the state," says the supreme court of Vermont, "extends to the protection of the lives, limbs, health, comfort and

quiet of all persons, and the protection of all property in the state. According to the maxim *sic utere tuo ut alienum non lædas*, which, being of universal application, it must, of course, be within the range of legislative action to *define the mode and manner in which every one may so use his own as not to injure others.*" *Thorpe v. Rutland & B. R. Co.*, 27 Vt., 149. "We think it a settled principle growing out of the nature of well-ordered civil society," says the supreme court of Massachusetts, "that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it *shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.*" *Commonwealth v. Alger*, 7 Cush., 84. In his Commentaries, after speaking of the protection afforded by the constitution to private property, Chancellor Kent says: "But though property be thus protected, it is still to be understood that the law-giver has the right to prescribe the mode and manner of using it, *so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public.* The government may, by general regulations, interdict such uses of property as would create nuisances and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, *on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.*" 2 Kent, 340.

The italics in these citations are mine. The citations show what I have already stated to be the case, that the regulations which the state, in the exercise of its police power, authorizes with respect to the use of property are entirely independent of any question of compensation for such use, or for the services of the owner in connection with it.

§ 1367. *Compensation for the use of grain elevators is not subject to regulation by the state.*

There is nothing in the character of the business of the defendants as warehousemen which called for the interference complained of in this case. Their buildings are not nuisances; their occupation of receiving and storing grain infringes upon no rights of others, disturbs no neighborhood, infects not the air, and in no respect prevents others from using and enjoying their property as to them may seem best. The legislation in question is nothing less than a bold assertion of absolute power by the state to control at its discretion the property and business of the citizen, and fix the compensation he shall receive. The will of the legislature is made the condition upon which the owner shall receive the fruits of his property and the just reward of his labor, industry and enterprise. "That government," says Story, "can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." *Wilkinson v. Leland*, 2 Pet., 657. The decision of the court in this case gives unrestrained license to legislative will.

The several instances mentioned by counsel in the argument, and by the court in its opinion, in which legislation has fixed the compensation which parties may receive for the use of their property and services, do not militate

against the views I have expressed of the power of the state over the property of the citizen. They were mostly cases of public ferries, bridges and turnpikes, of wharfingers, hackmen and draymen, and of interest on money. In all these cases, except that of interest on money, which I shall presently notice, there was some special privilege granted by the state or municipality; and no one, I suppose, has ever contended that the state had not a right to prescribe the conditions upon which such privilege should be enjoyed. The state in such cases exercises no greater right than an individual may exercise over the use of his own property when leased or loaned to others. The conditions upon which the privilege shall be enjoyed being stated or implied in the legislation authorizing its grant, no right is, of course, impaired by their enforcement. The recipient of the privilege, in effect, stipulates to comply with the conditions. It matters not how limited the privilege conferred, its acceptance implies an assent to the regulation of its use and the compensation for it. The privilege which the hackman and drayman have to the use of stands on the public streets, not allowed to the ordinary coachman or laborer with teams, constitutes a sufficient warrant for the regulation of their fares. In the case of the warehousemen of Chicago, no right or privilege is conferred by the government upon them; and hence no assent of theirs can be alleged to justify any interference with their charges for the use of their property.

The quotations from the writings of Sir Matthew Hale, so far from supporting the positions of the court, do not recognize the interference of the government, even to the extent which I have admitted to be legitimate. They state merely that the franchise of a public ferry belongs to the king, and cannot be used by the subject except by license from him, or prescription time out of mind; and that when the subject has a public wharf by license from the king, or from having dedicated his private wharf to the public, as in the case of a street opened by him through his own land, he must allow the use of the wharf for reasonable and moderate charges. Thus, in the first quotation which is taken from his treatise *De Jure Maris*, Hale says the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers without a prescription time out of mind or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequent tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable." Of course, one who obtains a license from the king to establish a public ferry, at which "every man for his passage pays a toll," must take it on condition that he charge only reasonable toll, and, indeed, subject to such regulations as the king may prescribe.

In the second quotation, which is taken from his treatise *De Portibus Maris*, Hale says: "A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharves only licensed by the king, or because there is no other wharf in that port, as it may fall out where a port is newly erected, in that case there

cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc.; neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by the public interest."

The purport of which is that if one have a public wharf, by license from the government or his own dedication, he must exact only reasonable compensation for its use. By its dedication to public use, a wharf is as much brought under the common law rule of subjection to reasonable charges as it would be if originally established or licensed by the crown. All property dedicated to public use by an individual owner, as in the case of land for a park or street, falls at once, by force of the dedication, under the law governing property appropriated by the government for similar purposes.

I do not doubt the justice of the encomiums passed upon Sir Matthew Hale as a learned jurist of his day; but I am unable to perceive the pertinency of his observations upon public ferries and public wharves, found in his treatises on "The Rights of the Sea" and on "The Ports of the Sea," to the questions presented by the warehousing law of Illinois, undertaking to regulate the compensation received by the owners of private property when that property is used for private purposes.

The principal authority cited in support of the ruling of the court is that of *Alnutt v. Inglis*, decided by the king's bench, and reported in 12 East. But that case, so far from sustaining the ruling, establishes, in my judgment, the doctrine that every one has a right to charge for his property, or for its use, whatever he pleases, unless he enjoys in connection with it some right or privilege from the government not accorded to others; and even then it only decides what is above stated in the quotations from Sir Matthew Hale, that he must submit, so long as he retains the right or privilege, to reasonable rates. In that case the London Dock Company, under certain acts of parliament, possessed the exclusive right of receiving imported goods into their warehouses before the duties were paid; and the question was whether the company was bound to receive them for a reasonable reward, or whether it could arbitrarily fix its compensation. In deciding the case the chief justice, Lord Ellenborough, said: "There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."

And, coming to the conclusion that the company's warehouses were invested with "the monopoly of a public privilege," he held that by law the company must confine itself to take reasonable rates; and added that if the crown should thereafter think it advisable to extend the privilege more generally to other persons and places, so that the public would not be restrained from exercising a choice of warehouses for the purpose, the company might be enfranchised from the restriction which attached to a monopoly; but, so long as its warehouses were the only places which could be resorted to for that purpose, the company was bound to let the trade have the use of them for a reasonable hire and reward. The other judges of the court placed their concurrence in

the decision upon the ground that the company possessed a legal monopoly of the business, having the only warehouses where goods imported could be lawfully received without previous payment of the duties. From this case it appears that it is only where some privilege in the bestowal of the government is enjoyed in connection with the property that it is affected with a public interest in any proper sense of the terms. It is the public privilege conferred with the use of the property which creates the public interest in it.

In the case decided by the supreme court of Alabama, where a power granted to the city of Mobile to license bakers, and to regulate the weight and price of bread, was sustained so far as regulating the weight of the bread was concerned, no question was made as to the right to regulate the price. 3 Ala., 137. There is no doubt of the competency of the state to prescribe the weight of a loaf of bread, as it may declare what weight shall constitute a pound or a ton. But I deny the power of any legislature, under our government, to fix the price which one shall receive for his property of any kind. If the power can be exercised as to one article, it may as to all articles, and the prices of everything, from a calico gown to a city mansion, may be the subject of legislative direction.

Other instances of a similar character may, no doubt, be cited of attempted legislative interference with the rights of property. The act of congress of 1820, mentioned by the court, is one of them. There congress undertook to confer upon the city of Washington power to regulate the rates of wharfage at private wharves and the fees for sweeping chimneys. Until some authoritative adjudication is had upon these and similar provisions, I must adhere, notwithstanding the legislation, to my opinion, that those who own property have the right to fix the compensation at which they will allow its use, and that those who control services have a right to fix the compensation at which they will be rendered. The chimney-sweeps may, I think, safely claim all the compensation which they can obtain by bargain for their work. In the absence of any contract for property or services, the law allows only a reasonable price or compensation; but what is a reasonable price in any case will depend upon a variety of considerations, and is not a matter for legislative determination.

The practice of regulating by legislation the interest receivable for the use of money, when considered with reference to its origin, is only the assertion of a right of the government to control the extent to which a privilege granted by it may be exercised and enjoyed. By the ancient common law it was unlawful to take any money for the use of money: all who did so were called usurers, a term of great reproach, and were exposed to the censure of the church; and if, after the death of a person, it was discovered that he had been a usurer whilst living, his chattels were forfeited to the king, and his lands escheated to the lord of the fee. No action could be maintained on any promise to pay for the use of money, because of the unlawfulness of the contract. Whilst the common law thus condemned all usury, parliament interfered and made it lawful to take a limited amount of interest. It was not upon the theory that the legislature could arbitrarily fix the compensation which one could receive for the use of property, which, by the general law, was the subject of hire for compensation, that parliament acted, but in order to confer a privilege which the common law denied. The reasons which led to this legislation originally have long since ceased to exist; and if the legislation is still persisted in, it is because a long acquiescence in the exercise of a power, especially when it was

rightfully assumed in the first instance, is generally received as sufficient evidence of its continued lawfulness. 10 Bac. Abr., 264.

There were also recognized in England, by the ancient common law, certain privileges as belonging to the lord of the manor, which grew out of the state of the country, the condition of the people, and the relation existing between him and his tenants under the feudal system. Among these was the right of the lord to compel all the tenants within his manor to grind their corn at his mill. No one, therefore, could set up a mill except by his license, or by the license of the crown, unless he claimed the right by prescription, which presupposed a grant from the lord or crown, and, of course, with such license went the right to regulate the tolls to be received. Woolrych on the Law of Waters, ch. 6, of Mills. Hence originated the doctrine, which at one time obtained generally in this country, that there could be no mill to grind corn for the public without a grant or license from the public authorities. It is still, I believe, asserted in some states. This doctrine being recognized, all the rest followed. The right to control the toll accompanied the right to control the establishment of the mill.

It requires no comment to point out the radical differences between the cases of public mills and interest on money and that of the warehouses in Chicago. No prerogative or privilege of the crown to establish warehouses was ever asserted at the common law. The business of a warehouseman was, at common law, a private business, and is so in its nature. It has no special privileges connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business. No reason can be assigned to justify legislation interfering with the legitimate profits of that business that would not equally justify an intermeddling with the business of every man in the community, so soon, at least, as his business became generally useful.

I am of opinion that the judgment of the supreme court of Illinois should be reversed.

#### RAILROAD COMPANY v. FULLER.

(17 Wallace, 560-570. 1873.)

ERROR to U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The case lies within a narrow compass, and presents but a single question for our consideration. That question is not difficult of solution. The second section, chapter 169, of the laws of the ninth general assembly of Iowa is as follows: "In the month of September, annually, each railroad company shall fix its rates of fare for passengers and freight, for transportation of timber, wood and coal, per ton, cord, or thousand feet, per mile; also, its fare and freight per mile for transporting merchandise and articles of the first, second, third and fourth grades of freight; and on the 1st day of October following shall put up at all stations and depots on its road a printed copy of such fare and freight, and cause a copy to remain posted during the year. For wilfully neglecting so to do, or for receiving higher rates of fare or freight than those posted, the company shall forfeit not less than \$100 nor more than \$200 to any person injured thereby and suing therefor."

The plaintiff in error was sued in the proper district court of the state for violations of these provisions. Among other defenses interposed, the company plead that the statute was in conflict with the commercial clause of the consti-

tution of the United States. Fuller demurred to the plea. The court sustained the demurrer and the company excepted. The case was afterwards submitted to a jury. The company prayed the court to instruct them that the act was invalid by reason of the conflict before mentioned. The court refused and the company again excepted. A verdict and judgment were rendered for the plaintiff. The company removed the case to the supreme court of the state, and there insisted upon these exceptions as errors. That court affirmed the judgment of the district court, and the company thereupon prosecuted this writ of error. Was there error in this ruling?

§ 1368. *A statute requiring railroad companies to fix and post rates of charges, and adhere to them during the year, is not a regulation of commerce.*

The constitution gives to congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The statute complained of provides that each railroad company shall, in the month of September, annually, fix its rates for the transportation of passengers and of freights of different kinds; that it shall cause a printed copy of such rates to be put up at all its stations and depots, and cause a copy to remain posted during the year; that a failure to fulfil these requirements, or the charging of a higher rate than is posted, shall subject the offending company to the payment of the penalty prescribed.

In all other respects there is no interference. No other constraint is imposed. Except in these particulars the company may exercise all its faculties as it shall deem proper. No discrimination is made between local and interstate freights, and no attempt is made to control the rates that may be charged. It is only required that the rates shall be fixed, made public, and honestly adhered to. In this there is nothing unreasonable or onerous. The public welfare is promoted without wrong or injury to the company. The statute was doubtless deemed to be called for by the interests of the community to be affected by it, and it rests upon a solid foundation of reason and justice. It is not, in the sense of the constitution, in anywise a regulation of commerce. It is a police regulation, and as such forms "a portion of the immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all which can be most advantageously exercised by the states themselves." *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *supra*).

§ 1369. *Concurrent powers of state and federal governments in regulating commerce.*

This case presents a striking analogy to a prominent feature in the case of *The Brig James Gray v. Ship John Fraser*, 21 How., 184. There the city authorities of Charleston had passed an ordinance prescribing where a vessel should lie in the harbor, what light she should show at night, and making other similar regulations. It was objected that these requirements were regulations of commerce, and, therefore, void. This court affirmed the validity of the ordinance.

In the complex system of polity which exists in this country the powers of government may be divided into four classes: Those which belong exclusively to the states. Those which belong exclusively to the national government. Those which may be exercised concurrently and independently by both. And those which may be exercised by the states, but only until congress shall see fit to act upon the subject.

The authority of the state then retires and lies in abeyance until the occasion for its exercise shall recur. *Ex parte McNiel*, 13 Wall., 240. Commerce



is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on. 2 Story on the Constitution, §§ 1061, 1062. The authority to regulate commerce, lodged by the constitution in congress, is in part within the last division of the powers of government above mentioned. Some of the rules prescribed in the exercise of that power must, from the nature of things, be uniform throughout the country. To that extent the authority itself must necessarily be exclusive, as much so as if it had been declared so to be by the constitution in express terms. Others may well vary with the varying circumstances of different localities. Where a stream, navigable for the purposes of foreign or interstate commerce, is obstructed by the authority of a state, such exercise of authority may be valid until congress shall see fit to intervene. The authority of congress in such cases is paramount and absolute, and it may compel the abatement of the obstruction whenever it shall deem it proper to do so. A few of the cases illustrating these views will be adverted to.

§ 1370. *Authorities reviewed.*

In *Willson v. Blackbird Creek Marsh Co.*, 2 Pet., 250 (§§ 1174-76, *supra*), under a law of the state of Delaware, a dam had been erected across the creek. This court held that the dam was a lawful structure, because not in conflict with any law of congress. In *Gilman v. Philadelphia*, 3 Wall., 728 (§§ 1164-70, *supra*), the state of Pennsylvania had authorized the erection of a bridge over the Schuylkill river, in the city of Philadelphia. This court refused to interpose because there was no legislation by congress affecting the river. The authority of congress over the subject was affirmed in the strongest terms. In *The Wheeling Bridge Case*, 18 How., 430 (§§ 1203-12, *supra*), the bridge was decreed to be a nuisance, because congress "had regulated the Ohio river, and had thereby secured to the public the free and unobstructed use of the same." Congress subsequently legalized the bridge, and this court held the case to be thereby terminated. In *Cooley v. Board of Wardens*, 12 How., 319 (§§ 1541-47, *infra*), the validity of a state law establishing certain pilotage regulations was drawn in question. It was admitted by this court that the regulations were regulations of commerce, but it was held that they were valid and would continue to be so until superseded by the action of congress. In *Ex parte McNiel*, *supra*, the same question arose, and the doctrine of the preceding case was reaffirmed. In *The James Gray v. The John Fraser*, 21 How., 184, stress was laid upon the fact that there was no act of congress in conflict with the city ordinance in question. See, also, in this connection, *Osborne v. Mobile*, 16 Wall., 479 (§ 1268, *supra*).

If the requirements of the statute here in question were, as contended by the counsel for the plaintiff in error, *regulations of commerce*, the question would arise whether, regarded in the light of the authorities referred to, and of reason and principle, they are not regulations of such a character as to be valid until superseded by the paramount action of congress. But as we are unanimously of the opinion that they are merely police regulations, it is unnecessary to pursue the subject.

*Judgment affirmed.*

§ 1371. *Fixing rates of charges.*—A law which fixes maximum rates of charges on a railroad, which forms a continuous line with a road in another state, is not void as being a regulation of interstate commerce. *Chicago, etc., R. Co. v. Iowa*, 4 Otto, 155 (§§ 2133-42). See *CORPORATIONS*, § 1774.

5. *Discrimination against the Products of Other States.*

**SUMMARY**—*License for sale of goods a tax upon the goods*, § 1872.—*Tax on peddlers selling goods of other states*, §§ 1878, 1875.—*License tax held not to discriminate*, § 1874.—*Rights under patent laws*, § 1876.—*License tax discriminating against wine and beer of other states*, § 1877.—*Wharfage charges*, § 1878.

§ 1872. Where a business or occupation consists in the sale of goods, a license tax required for its pursuit is in effect a tax upon the goods themselves. *Welton v. State of Missouri*, §§ 1879-83.

§ 1873. A state statute requiring peddlers selling goods not the growth or manufacture of the state to pay a license tax is void as a regulation of interstate commerce. *Ibid.* See § 1401.

§ 1874. A state law required peddlers of sewing-machines to pay a license tax. The supreme court of the state held that the law imposed the tax upon all peddlers of sewing-machines, without regard to the place of growth or produce of material or manufacture. *Held*, that this construction was binding on the federal supreme court, and that the law as thus construed was not unconstitutional. *Machine Co. v. Gage*, §§ 1884-86.

§ 1875. A statute of a state imposing a license tax upon traveling agents for the sale of goods manufactured in other states, but which imposes no tax upon agents for the sale of goods manufactured within the state, is unconstitutional as being a regulation of interstate commerce. *Webber v. Virginia*, §§ 1887-90.

§ 1876. The right conferred by the patent laws to inventors to sell their inventions throughout the country does not take the tangible property in which the invention is exhibited from the operation of the tax and license laws of the states. *Ibid.*

§ 1877. A statute of Texas, which required a license tax from persons engaged in selling liquors, excepted wine and beer manufactured in the state. *Held*, that the law, so far as it discriminated against wine and beer of other states, was void; but a person, who was liable to pay the tax by reason of the sale of other liquors besides wine and beer, could not enjoin the tax on account of the discrimination. *Tiernan v. Rinker*, §§ 1891-93. See § 1403.

§ 1878. A city ordinance, requiring vessels laden with the products of other states to pay fees for the use of the wharf not imposed upon vessels laden with the products of the state, is unconstitutional. *Guy v. Baltimore*, §§ 1394-1400. See § 1405 *et seq.*

[NOTES.— See §§ 1401-1403.]

## WELTON v. STATE OF MISSOURI

(1 Otto, 275-283. 1875.)

Opinion by MR. JUSTICE FIELD.

**STATEMENT OF FACTS.**—This case comes before us on a writ of error to the supreme court of Missouri, and involves a consideration of the validity of a statute of that state, discriminating in favor of goods, wares and merchandise which are the growth, product or manufacture of the state, and against those which are the growth, product or manufacture of other states or countries, in the conditions upon which their sale can be made by traveling dealers. The plaintiff in error was a dealer in sewing-machines which were manufactured without the state of Missouri, and went from place to place in the state selling them without a license for that purpose. For this offense he was indicted and convicted in one of the circuit courts of the state, and was sentenced to pay a fine of \$50, and to be committed until the same was paid. On appeal to the supreme court of the state, the judgment was affirmed.

The statute under which the conviction was had declares that whoever deals in the sale of goods, wares or merchandise, except books, charts, maps and stationery, which are not the growth, produce or manufacture of the state, by going from place to place to sell the same, shall be deemed a peddler; and then enacts that no person shall deal as a peddler without a license, and prescribes the rates of charge for the licenses, these varying according to the manner in

which the business is conducted, whether by the party carrying the goods himself on foot, or by the use of beasts of burden, or by carts or other land carriage, or by boats or other river vessels. Penalties are imposed for dealing without the license prescribed. No license is required for selling in a similar way, by going from place to place in the state, goods which are the growth, product or manufacture of the state. The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the supreme court of the state; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the state.

§ 1379. *A license tax upon a business or occupation which consists of the sale of goods is a tax upon the goods themselves.*

The general power of the state to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the federal constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in congress by the constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license.

In the case of *Brown v. State of Maryland*, 12 Wheat., 425 (§§ 1466-70, *infra*), the question arose, whether an act of the legislature of Maryland, requiring importers of foreign goods to pay the state a license tax before selling them in the form and condition in which they were imported, was valid and constitutional. It was contended that the tax was not imposed on the importation of foreign goods, but upon the trade and occupation of selling such goods by wholesale after they were imported. It was a tax, said the counsel, upon the profession or trade of the party when that trade was carried on within the state, and was laid upon the same principle with the usual taxes upon retailers or innkeepers, or hawkers and peddlers, or upon any other trade exercised within the state. But the court in its decision replied that it was impossible to conceal the fact that this mode of taxation was only varying the form without varying the substance; that a tax on the occupation of an importer was a tax on importation, and must add to the price of the article, and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself. Treating the exaction of the license tax from the importer as a tax on the goods imported, the court held that the act of Maryland was in conflict with the constitution; with the clause prohibiting a state, without the consent of congress, from laying any impost or duty on imports or exports; and with the clause investing congress with the power to regulate commerce with foreign nations.

§ 1380. *Scope of the power to regulate commerce.*

So, in like manner, the license tax exacted by the state of Missouri from dealers in goods which are not the product or manufacture of the state, before they can be sold from place to place within the state, must be regarded as a tax upon such goods themselves; and the question presented is, whether legislation thus discriminating against the products of other states in the conditions of their sale by a certain class of dealers is valid under the constitution of the United States. It was contended in the state courts, and it is urged here, that this legislation violates that clause of the constitution which declares that con-

gress shall have the power to regulate commerce with foreign nations and among the several states. The power to regulate conferred by that clause upon congress is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed,—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled; how far it shall be burdened by duties and imposts, and how far it shall be prohibited.

Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the states may provide regulations until congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.

§ 1381. *That portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is national, and admits and requires uniformity of regulation.*

It will not be denied that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. "It was regulated," says Chief Justice Marshall, in delivering the opinion in *Brown v. Maryland*, "by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them became so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress." 12 Wheat., 446.

The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the state or nation, it can be subjected to any restrictions by state legislation, the object of investing the control in congress may be entirely defeated. If Missouri can require a license tax for the sale by traveling dealers of goods which are the growth, product or manu-

facture of other states or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

§ 1382. *Difficulty in determining where the commercial power of congress ends and the power of the state begins.*

The power of the state to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one state and injurious to the interests of other states and countries, which existed previous to the adoption of the constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states. There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of congress ends and the power of the state begins. A similar difficulty was felt by this court, in *Brown v. Maryland*, in drawing the line of distinction between the restriction upon the power of the states to lay a duty on imports, and their acknowledged power to tax persons and property; but the court observed that the two, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them; but that, as the distinction exists, it must be marked as the cases arise. And the court, after observing that it might be premature to state any rule as being universal in its application, held that, when the importer had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import, and become subject to the taxing power of the state; but that, while remaining the property of the importer in his warehouse in the original form and package in which it was imported, the tax upon it was plainly a duty on imports prohibited by the constitution. Following the guarded language of the court in that case, we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the federal government over a commodity has ceased, and the power of the state has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is therefore, in our judgment, unconstitutional and void.

§ 1383. *The inaction of congress with respect to interstate commerce is equivalent to a declaration that it shall remain free and untrammelled.*

The fact that congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri. The views here expressed are not only supported by the case of *Brown v. Maryland*, already cited, but also by the

case of *Woodruff v. Parham*, 8 Wall., 123 (§§ 1471-73, *infra*), and the case of *State Freight Tax*, 15 Wall., 232 (§§ 1255-62, *supra*). In the case of *Woodruff v. Parham*, Mr. Justice Miller speaking for the court, after observing, with respect to the law of Alabama then under consideration, that there was no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case was not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity, said, "But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, and therefore void."

The judgment of the supreme court of the state of Missouri must be reversed, and the cause remanded, with directions to enter a judgment reversing the judgment of the circuit court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without day.

#### MACHINE COMPANY v. GAGE.

(10 Otto, 676-679. 1879.)

ERROR to the Supreme Court of Tennessee.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The Howe Machine Company is a corporation of the state of Connecticut. It manufactured sewing-machines at Bridgeport, in that state, and had an agency at Nashville, in the state of Tennessee. From the latter place, an agent was sent into Sumner county to sell machines there. A tax was demanded from him for a peddler's license to make such sales. He denied the validity of the law under which the tax was claimed, but, according to a law of the state, paid the amount demanded by the defendant, as clerk of the county court. The company, who brought this suit to recover it back, was defeated in the lower court, and the judgment was affirmed by the supreme court of the state.

The constitution of Tennessee (art. 11, sec. 30) declares that "no article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees." "Sales by peddlers of articles manufactured or made up in this state, and scientific or religious books, are exempt from taxation." Code of Tennessee, sec. 546. "All articles manufactured of the produce of the state are exempt from assessment or taxation." Acts of 1875, ch. 98, sec. 10. "All peddlers of sewing-machines and selling by sample" shall pay a tax of \$10. Code, sec. 553a, subsec. 43. By a subsequent act of the legislature, this tax was increased to \$15.

§ 1384. *This court bound by state constructions of state laws.*

The sewing-machines here in question were made in Connecticut. The supreme court of the state held, in this case, "that the law taxing the peddlers of such machines levied the tax upon all peddlers of sewing-machines, without regard to the place of growth or produce of material or of manufacture." We are bound to regard this construction as correct, and to give it the same effect as if it were a part of the statute. *Leffingwell v. Warren*, 2 Black, 599.

§ 1385. *A state has a right to impose a tax on peddlers, provided it makes no discrimination in favor of its own citizens.*

The question presented for our consideration is not difficult of solution. A brief reference, however, to some of the adjudications of this court, bearing

with more or less directness upon the subject, may not be without interest. A state cannot require a license to be taken out to sell foreign goods while remaining in the packages in which they were imported. Such a law is contrary to the provision of the constitution of the United States touching the laying of imposts by a state, and to the commerce clause of that instrument. *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*). A state cannot give to the master and wardens of a port, in addition to other fees, the sum of \$5, whether they are called on to perform any service or not, for every vessel arriving in the port. This would be a regulation of commerce and a tonnage duty, both involving the exercise of a power which is withheld from the states. *Steamship Co. v. The Portwardens*, 6 Wall, 31 (§§ 1535-38, *infra*). A purchaser of goods coming from abroad, the goods to be at his risk until delivered to him, is not an importer, and the goods may be taxed while in the original packages. *Waring v. The Mayor*, 8 id., 110 (§§ 1474-77, *infra*).

The provision in the constitution of the United States, that "no state shall levy imposts or duties on imports or exports," does not refer to articles brought from one state into another, but exclusively to articles imported from foreign countries. Hence, a tax imposed by a state upon all auction sales, whether by citizens of such state or of another state, and whether the articles are the products of such state or of another state, without any discrimination, is valid. *Woodruff v. Parham*, id., 123 (§§ 1471-73, *infra*). Where a state imposes the same rate of taxation upon like articles, whether brought from another state or the products of the state imposing the tax, the tax may be enforced. *Hinson v. Lott*, id., 148.

A state cannot impose a higher tax upon peddlers from another state than is imposed upon her own citizens under like circumstances. Any discrimination in favor of the latter is fatal to the statute. *Ward v. Maryland*, 12 id., 163, 418 (§§ 825-828, *supra*). A state cannot impose a tonnage tax upon vessels belonging to her own citizens, and engaged exclusively in commerce between places within her own limits. *Id.*, 204 (§§ 1431-36, *infra*). A state law imposing a tax upon freight brought into, taken from, or carried through the state is a regulation of commerce, and contrary to the provision of the constitution which declares that "congress shall have power to regulate commerce with foreign nations, between the several states, and with the Indian tribes." *Case of State Freight Tax*, 15 id., 232 (§§ 1255-62, *supra*). A state cannot impose a tonnage tax upon vessels owned in foreign ports, to defray the expenses of administering her quarantine regulations. *Peete v. Morgan*, 19 id., 531.

§ 1386. *A license tax is a tax upon the goods sold.*

A tax for a license to sell goods is in effect a tax on the goods authorized to be sold. A law which requires a license to be taken out by peddlers who sell articles not produced in the state, and requires no such license with respect to those who sell in the same way articles which are produced in the state, is in conflict with the power of congress to regulate commerce with foreign nations and among the several states. This power applies to articles taken from one state into another, until they become mingled with and a part of the property of the latter, and thereafter protects such articles from any burden imposed by reason of their foreign origin.

The non-exercise by congress of the power to regulate interstate commerce is equivalent to a declaration that it shall be free from any restrictions. *Welton v. State of Missouri*, 91 U. S., 275 (§§ 1379-S3, *supra*). A state may demand from a vessel a list of passengers, with their ages, places of birth, occupations,

last place of legal settlement, etc. Such a requirement is a police regulation. *City of New York v. Miln*, 11 Pet., 102 (§§ 1274–83, *supra*).

But it cannot require a sum to be paid for each passenger landed. *Passenger Cases*, 7 How., 283 (§§ 1284–1335, *supra*).

A statute which imposes a heavily burdensome condition upon a ship-master as a prerequisite to landing his passengers, and allows him the alternative of paying a small sum for each one landed, is a regulation of commerce, and therefore void. What may be done by a state to protect itself from the influx of paupers and convicted criminals, in the absence of legislation on the subject by congress, is left undecided. *Henderson v. Mayor of New York*, 92 U. S., 260 (§§ 1336–42, *supra*). A tax by a state on the amount of goods sold at auction is a tax upon the goods so sold. A law which requires every auctioneer to pay into the state treasury a tax on his sales is, when applied to goods imported and sold in the original packages, in conflict with sections 8 and 10, article 1, of the constitution of the United States, and therefore invalid. *Cook v. Pennsylvania*, 97 id., 566 (§§ 1478–80, *infra*). A state cannot by law authorize a municipal corporation to exact such wharfage as it may deem reasonable from vessels using certain designated wharves, and laden with articles not the products of the state, while vessels laden with such products of the state are exempted from any charge whatever. Such a statute, and an ordinance enacted by the corporation to carry it out, are void. They are a regulation of commerce. *Guy v. Baltimore*, 10 Otto, 434 (§§ 1394–1400, *infra*).

In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the state or of the citizens of the state which enacted the law. Wherever there is, such discrimination is fatal. Other considerations may lead to the same result. In the case before us, the statute in question, as construed by the supreme court of the state, makes no such discrimination. It applies alike to sewing-machines manufactured in the state and out of it. The exaction is not an unusual or unreasonable one. The state, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden. *Woodruff v. Parham*, *Hinson v. Lott*, *Ward v. State of Maryland*, *Welton v. State of Missouri*, *supra*.

*Judgment affirmed.*

#### WEBBER v. VIRGINIA.

(13 Otto, 344–351. 1880.)

ERROR to the Supreme Court of Appeals of Virginia.

STATEMENT OF FACTS.—Webber was indicted in Henrico county, Virginia, for selling sewing-machines without having obtained and paid for a county license as required by law. The law of Virginia imposed a license tax on goods manufactured out of the state, which was not required of vendors of goods manufactured within the state. Webber was found guilty and fined \$50, and the case having gone to the supreme court of appeals of Virginia was brought up on writ of error.

§ 1387. *United States patents do not exempt articles manufactured under them from state taxation.*

Opinion by MR. JUSTICE FIELD.

In the county court where the accused was tried the only defense presented by his instructions was that he was acting as the agent of the Singer Manufact-



uring Company, which had a license from the state as a resident merchant in Richmond to sell the machines, and also held a patent of the United States, authorizing it to manufacture and sell them anywhere in the United States. To this defense the answer is obvious. The license, being limited to the city of Richmond, gave no authority to the company to sell the machines elsewhere, and of course gave none to its agent. Besides, the question as to the extent of the territorial operation of the license depended upon the construction given by the court of appeals of the state to the statute, and its decision thereon is not open to review by us. And the right conferred by the patent laws of the United States to inventors to sell their inventions and discoveries does not take the tangible property, in which the invention or discovery may be exhibited or carried into effect, from the operation of the tax and license laws of the state. The combination of different materials so as to produce a new and valuable product or result, or to produce a well known product or result more rapidly or better than before, which constitutes the invention or discovery, cannot be forbidden by the state, nor can the sale of the article or machine produced be restricted except as the production and sale of other articles for the manufacture of which no invention or discovery is patented or claimed may be forbidden or restricted.

§ 1388. *The patent laws do not in any degree restrict the police powers of a state.*

The patent for a dynamite powder does not prevent the state from prescribing the conditions of its manufacture, storage and sale, so as to protect the community from the danger of explosion. A patent for the manufacture and sale of a deadly poison does not lessen the right of the state to control its handling and use. The legislation respecting the articles which the state may adopt after the patents have expired, it may equally adopt during their continuance. It is only the right to the invention or discovery — the incorporeal right — which the state cannot interfere with. Congress never intended that the patent laws should displace the police powers of the states, meaning by that term those powers by which the health, good order, peace and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the state over all property within its limits.

These views find support in the language of this court in *Patterson v. Kentucky*, 97 U. S., 501. There a party was convicted of violating a statute of the state regulating the inspection and gauging of oils and fluids, the product of coal, petroleum or other bituminous substances. The statute provided that such oils and fluids should be inspected by an authorized officer of the state before being used, sold, or offered for sale, and required the inspector to brand, according to the fact, casks and barrels of the oil with the words "standard oil," or with the words "unsafe for illuminating purposes." It imposed a penalty for selling or offering for sale in the state such oils and fluids as had been condemned. A particular oil, known as the Aurora oil, which had been thus condemned, was sold by the accused. A patent for the oil had been issued by the United States to a party who had assigned it to him, and in defense to the indictment he asserted the right under the patent to sell the oil in any part of the United States, and that no state could, consistently with the federal constitution and the laws of congress, prevent or obstruct its exercise. But the court held this construction of the constitution and laws to be inadmissible, and that the right was to be exercised in subordination to the general powers which the

several states possessed over their purely domestic affairs, whether of internal commerce or police. After some just observations upon the police powers of the state, their extent and object, and a reference to previous decisions, the court said, speaking through Mr. Justice Harlan: "These considerations, gathered from the former decisions of this court, would seem to justify the conclusion that the right which the patentee or his assignee possesses in the property created by the application of a patented discovery, must be enjoyed subject to the complete and salutary power, with which the states have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few. The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plates by which copies of a map are multiplied is distinct from the copyright of the map itself." And again, the enjoyment of the right in the discovery "may be secured and protected by national authority against all interference; but the use of the tangible property which comes into existence by the application of the discovery is not beyond the control of state legislation simply because the patentee acquires a monopoly in his discovery." In accordance with the views thus expressed we can find no objection to the legislation of Virginia in requiring a license for the sale of the sewing-machines by reason of the grant of letters patent for the invention.

§ 1389. *A state cannot discriminate in its license laws or taxation against the productions of other states.*

There is, however, an objection to its legislation arising from its discriminating provisions against non-resident merchants and their agents, and this is presented by the instructions given to the jury at the request of the attorney of the commonwealth. The forty-fifth section of the revenue law declares that "any person who shall sell or offer for sale the manufactured articles or machines of other states or territories, unless he be the owner thereof and taxed as a merchant, or take orders therefor, on commission or otherwise, shall be deemed to be an agent" for the sale of those articles, and shall not act as such without taking out a license therefor. A violation of this provision subjects the offender to a fine of not less than \$50 nor more than \$100 for each offense. The forty-sixth section fixes the license tax of the agent for the sale of such articles at \$25. The license only gives him a right to sell in the county or corporation for which it is issued. If he sells or offers to sell in other counties or corporations, he must pay in each an additional tax of \$10. The section then declares that "all persons, other than resident manufacturers or their agents, selling articles manufactured in the state shall pay the specific license tax imposed by this section."

By these sections, read together, we have this result: the agent for the sale of articles manufactured in other states must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the state, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other states. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured

without the state, it is to that extent a regulation of commerce in the articles between the states. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the state can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the constitution intended to guard when they vested in congress the power to regulate commerce among the several states.

In *Welton v. State of Missouri* (1 Otto, 275; §§ 1379-83, *supra*), we expressed at length our views on the subject, and to our opinion we may refer for their statement. No one questions the general power of the state to require licenses for the various pursuits and occupations conducted within her limits, and to fix their amount as she may choose, and no one on this bench — certainly not the writer of this opinion — would wish to limit or qualify it in any respect, except when its exercise may impinge upon the just authority of the federal government under the constitution or the limitations prescribed by that instrument. But where a power is vested exclusively in that government, and its exercise is essential to the perfect freedom of commercial intercourse between the several states, any interfering action by them must give way. This was stipulated in the indissoluble covenant by which we became one people.

In a recent case we had occasion to consider at some length the extent of the commercial power vested in congress, and how far it is to be deemed exclusive of state authority. Referring to the great variety of subjects upon which congress, under that power, can act, we said that "some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale and exchange of commodities. Here there can, of necessity, be only one system or plan of regulations, and that congress alone can prescribe. Its non-action in such cases, with respect to any particular commodity or mode of transportation, is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and citizens and against the products and citizens of other states." *County of Mobile v. Kimball*, 102 U. S., 691 (§§ 1177-82, *supra*).

§ 1390. *Commerce free, when.*

Commerce among the states in any commodity can only be free when the commodity is exempted from all discriminating regulations and burdens imposed by local authority by reason of its foreign growth or manufacture.

The judgment of the supreme court of appeals of Virginia must, therefore, be reversed, and the cause remanded to it for further proceedings in accordance with this opinion; and it is so ordered.

TIERNAN *v.* RINKER.

(12 Otto, 123-128. 1880.)

ERROR to the Supreme Court of Texas.

STATEMENT OF FACTS.—A statute of Texas required a certain annual tax from all persons engaged in selling spirituous, vinous, malt and other liquors, but it was provided that the act should not apply to wines or beer manufactured in the state. Tiernan and others were engaged in selling liquors, the wines and beer sold by them not being the product of the state, and they sought to enjoin the collection of the tax on the ground that it discriminated against the products of other states. A demurrer to the petition was sustained and the case was dismissed.

Opinion by MR. JUSTICE FIELD.

The petitioners rely upon the ruling of this court in the case of *Welton v. State of Missouri* (1 Otto, 275; §§ 1379-83, *supra*) to sustain their position. There the state had exacted the payment of a license tax from traveling peddlers who dealt in the sale of goods, wares and merchandise which were not the growth, product or manufacture of the state, and required no such license tax from similar traders selling goods which were the growth, product or manufacture of the state. And this court held, following in that respect the ruling in *Brown v. State of Maryland* (12 Wheat., 419; §§ 1466-70, *infra*), that the tax exacted from dealers in goods before they could be sold was in effect a tax upon the goods themselves, and that the legislation which thus discriminated against the products of other states in the conditions upon which they could be sold by a certain class of dealers was in conflict with the commercial clause of the constitution.

§ 1391. *Construction of the constitutional power of congress to regulate commerce between the states.*

In deciding the case, the court observed that the power conferred by this clause to regulate commerce with foreign nations and among the several states is without limitation; and that to regulate commerce is to prescribe the conditions upon which it shall be conducted; to determine how far it shall be free from restrictions; how far it shall be subjected to duties and imposts, and how far it shall be prohibited; that when the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of state authority; that the portion of commerce with foreign countries or between the states, which consists in the transportation and exchange of commodities, is of national importance and admits and requires uniformity of regulation; that the object of vesting this power in the general government was to insure this uniformity against discriminating state legislation; and that to that end this power must cover the property which is the subject of trade from hostile or interfering legislation until it has become a part of the general property of the country and subject to similar protection and to no greater burdens. If, before that time, the property can become subject to any restrictions by state legislation, the object of vesting the control in congress may be defeated. If the state can exact a license tax from one class of traders for the sale of goods which are the growth, product or manufacture of other states, it can exact the license from all traders in such goods, and the amount of the tax will rest in its discretion. "Imposts," the court said, "operating as an absolute exclusion of the goods, would be possible, and all the evils of discriminating state legislation favorable to the inter-

ests of one state and injurious to the interests of other states and countries, which existed previous to the adoption of the constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states." The court, therefore, held that the commercial power of the federal government over a commodity continued until the commodity had ceased to be the subject of discriminating legislation in any state by reason of its foreign character, and that this power protects it after it has entered the state from any burdens imposed by reason of its foreign origin. The court also held that the inaction of congress to prescribe any specific rules to govern interstate commerce, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled, and that this policy would be defeated by discriminating legislation like that of Missouri. The doctrine of this case has never been questioned; it has been uniformly recognized and approved, and expresses now the settled judgment of the court.

§ 1392. *A license tax which discriminates against wines and beer of other states is invalid.*

According to it the statute of Texas is inoperative, so far as it makes a discrimination against wines and beer imported from other states, when sold separately from other liquors. A tax cannot be exacted for the sale of beer and wines when a foreign manufacture, if not exacted from their sale when of home manufacture. If a party be engaged exclusively in the sale of these liquors, or in any business for which a tax is levied because it embraces a sale of them, he may justly object to the discriminating character of the act, and on that account challenge its validity, under the decision in question; but if engaged in the sale of other liquors than beer or wines, he cannot complain of the state tax on that ground. The statute makes no discrimination in favor of other liquors of home manufacture. Whilst it groups the sale of several kinds of liquors as one occupation, it evidently intends that the occupation which consists in the sale of any one of the several liquors named, in the quantities mentioned, shall be subject to taxation, as though it read "for selling spirituous, or vinous, or malt, or other intoxicating liquors." It does not require, to justify the tax, that a party shall be engaged in the sale of all the liquors mentioned, as well as other liquors. This being the true construction of the act, there can be no objection to its enforcement where the tax is levied for occupations for the sale of other liquors than wines and beers.

§ 1393. — *but the payment of the tax cannot be resisted where the party is engaged in selling other liquors.*

In the present case the petitioners describe themselves as engaged in the occupation of selling spirituous, vinous, malt and other intoxicating liquors; that is, in all the liquors mentioned and others not mentioned. There is no reason why they should be exempted from the tax when selling brandies and whiskies and other alcoholic drinks, in the quantities mentioned, because they could not be thus taxed if their occupation was limited to the sale of wines and beer.

We see, therefore, no error in the ruling of the supreme court of Texas, and its judgment is accordingly affirmed.

## GUY v. BALTIMORE.

(10 Otto, 434-444. 1879.)

ERROR to the Baltimore City Court of Maryland.

STATEMENT OF FACTS.—The city of Baltimore levied upon the products of other states wharfage and harbor dues not imposed on such products brought from the state of Maryland. Guy, a citizen of Virginia, refused to pay the charges, and a judgment was recovered against him for the penalty.

Opinion by MR. JUSTICE HARLAN.

In *Woodruff v. Parham*, 8 Wall., 123 (§§ 1471-73, *infra*), we had occasion to consider the constitutional validity of an ordinance of the city of Mobile under the provisions of which had been assessed, for municipal purposes, a tax upon sales in that city of certain goods and merchandise, the product of states other than Alabama. The ordinance, in its application to articles carried into Alabama from other states, was assailed as being inconsistent with the constitutional inhibition upon the states levying imposts or duties on imports or exports,—with the power of congress to regulate commerce with foreign nations and among the several states,—and with that clause which declares that the citizens of each state shall be entitled to all the immunities and privileges of citizens of the several states.

§ 1394. *Signification of the word "import."*

Touching the first of these propositions it was ruled that the term import, as used in section 10, article 1, of the constitution, had reference to articles imported from foreign countries, and not to such as were brought from one of the states of the Union into another. In the argument, *Brown v. Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*), was cited in support of the proposition that the whole ordinance, in its application to articles brought from other states to Mobile for sale, was an unauthorized regulation of interstate commerce. Upon that branch of the case, we said: "If the court there [in *Brown v. Maryland*] meant to say that a tax levied on goods from a sister state, which was not levied on goods of a similar character produced within the state, would be in conflict with the clause of the constitution giving congress the right to regulate commerce among the states, as much as the tax on foreign goods, then under consideration, was in conflict with the authority to regulate commerce with foreign nations, we agree to the proposition."

In a subsequent portion of our opinion in *Woodruff v. Parham*, it was said: "But we may be asked, is there no limit to the power of the states to tax the produce of other states brought within their borders? And can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory? The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama, or of another state, and whether the goods sold are the products of that state or of some other. There is no attempt to discriminate injuriously against the products of other states, or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, and, therefore, void."

In *Hinson v. Lott*, 8 Wall., 148, we upheld a statute of Alabama, imposing taxes upon the sale of spirituous liquors within its limits, upon the ground that

it did not discriminate against the products of other states, and only subjected them to the same taxation imposed upon similar articles manufactured in that state. Had the statute been susceptible of a different construction, it would have been held to be repugnant to the constitution.

In *Ward v. Maryland*, 12 id., 418 (§§ 825-828, *supra*), we examined the provisions of a statute of Maryland which, among other things, required of persons, not permanent residents of that state, before selling or offering for sale within the limits of the city of Baltimore, any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in that state, to obtain a license therefor. The amount exacted for such license was larger than the statute required of resident traders engaged in like business. In declaring the statute to be repugnant to the federal constitution, we said that, "inasmuch as the constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the defendant might lawfully sell or offer or expose to sale, within the district described in the indictment, any goods which the permanent residents of the state might sell or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents." Upon the same ground, in the more recent case of *Welton v. State of Missouri*, 91 U. S., 275 (§§ 1379-83, *supra*), we held void a statute of Missouri imposing a peddler's license-tax upon persons going from place to place to sell patent and other medicines, goods, wares or merchandise, except books, charts, maps and stationery, not the growth, product or manufacture of that state, and which did not impose a like tax upon the sale of similar articles, the growth, product or manufacture of Missouri.

§ 1395. *No state can impose upon the products of another state more onerous burdens than it imposes upon like products of its own territory.*

In view of these and other decisions of this court, it must be regarded as settled that no state can, consistently with the federal constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of congress to regulate commerce with foreign nations and among the several states could be practically annulled, and the equality of commercial privileges secured by the federal constitution to citizens of the several states be materially abridged and impaired. "Over whatever other interests of the country," said Mr. Webster, "this government may diffuse its benefits and blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system." But state legislation such as that indicated in the cases which have been cited, if maintained by this court, would ultimately bring our commerce to that "oppressed and degraded state," existing at the adoption of the present constitution, when the helpless, inadequate confederation was abandoned and a national government instituted, with full power over the entire subject of commerce, except that wholly internal to the states composing the Union.

§ 1396. *The law of Maryland of 1827, authorizing the collection of wharfage dues on articles other than the products of the state, is unconstitutional.*

How far the principles enunciated in the foregoing cases control the deter-

mination of the one before us, we now proceed to inquire. By an act of the general assembly of Maryland, passed in 1827, authority was given to the mayor and city council of Baltimore to regulate, establish, charge and collect to their use such rate of wharfage as they might think reasonable, of and from all vessels resorting to or lying at, landing, depositing or transporting goods or articles, *other than the products of that state*, on any wharf or wharves belonging to that municipal corporation, or any public wharf in the city other than the wharves belonging to or rented by the state, and that part of Pratt street wharf, theretofore reserved for the use of the citizens of that state. Maryland Code of Public Local Laws, art. 4, sec. 945. In pursuance of that act the city, by its constituted authorities, in the year 1858, passed an act regulating the public wharves. By its thirty-third section it is declared that all goods, wares or merchandise landed on the public wharves from on board any vessels lying at said wharves, or placed thereon for the purpose of shipment or exposure for sale, *other than the product of the state of Maryland*, shall pay wharfage according to certain rates therein prescribed. The thirty-fifth section declares that "all vessels belonging to or lying at, landing, depositing or transporting goods or articles *other than the production of this state*, on or from any wharf or wharves belonging to the mayor and city council, or any public wharf in the said city other than the wharves belonging to or rented by the state, shall be chargeable with the wharfage, as fixed by this ordinance, upon all goods or articles landed or deposited on any wharf or wharves belonging to the said mayor and city council; and the master or owner of the vessel so depositing, landing or transporting said goods or articles shall be responsible for the same." The ordinance contained other sections providing for its enforcement.

The appellant Guy, a resident citizen of Accomac county, Virginia, was engaged in the year 1876 in sailing a schooner, of which he was master and part owner, from that county to Baltimore, laden with potatoes raised in Virginia. In June of that year he landed his vessel at one of the public wharves belonging to the city (not that part of the Pratt street wharf reserved), and discharged therefrom two hundred and twenty barrels of potatoes. Under the authority of the foregoing statute and ordinance, the city harbor-master demanded of him the payment of \$4.40 as wharfage. He refused to comply with that demand, and, being sued by the city, judgment was rendered against him in the court of a justice of the peace, which was affirmed by the city court of Baltimore, the highest court of Maryland in which a decision of the case could have been had. It is admitted that such wharfage dues are not and never have been assessed against parties or vessels bringing to that port potatoes or other articles grown in the state of Maryland.

§ 1397. *A discrimination against the products of other states, under color of wharfage dues, is illegal.*

The argument in support of the statute and ordinance upon which the judgment below rests is that the city, by virtue of its ownership of the wharves in question, has the right, in its discretion, to permit their use to all vessels landing thereat with the products of Maryland; and that those operating vessels laden with the products of other states cannot justly complain, so long as they are not required to pay wharfage fees in excess of reasonable compensation for the use of the city's property. This proposition, however ingenious or plausible, is unsound both upon principle and authority. The municipal corporation of Baltimore was created by the state of Maryland to promote the public interests and the public convenience. The wharf at which appellant



landed his vessel was long ago dedicated to public use. The public, for whose benefit it was acquired, or who are entitled to participate in its use, are not alone those who may engage in the transportation to the port of Baltimore of the products of Maryland. It embraces, necessarily, all engaged in trade and commerce upon the public navigable waters of the United States. Every vessel employed in such trade and commerce may traverse those waters without let or hindrance from local or state authority; and the national constitution secures to all so employed, without reference to the residence or citizenship of the owners, the privilege of landing at the port of Baltimore with any cargo whatever not excluded therefrom by, or under the authority of, some statute in Maryland enacted in the exertion of its police powers. The state, it will be admitted, could not lawfully impose upon such cargo any direct public burden or tax because it may consist, in whole or in part, of the products of other states. The concession of such a power to the states would render wholly nugatory all national control of commerce among the states, and place the trade and business of the country at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular states.

§ 1398. — *and a state cannot empower its municipal corporations to do anything which it cannot do itself.*

But it is claimed that a state may empower one of its political agencies, a mere municipal corporation representing a portion of its civil power, to burden interstate commerce by exacting from those transporting to its wharves the products of other states, wharfage fees which it does not exact from those bringing to the same wharves the products of Maryland. The city can no more do this than it or the state could discriminate against the citizens and products of other states in the use of the public streets or other public highways. The city of Baltimore, if it chooses, can permit the public wharves which it owns to be used without charge. Under the authority of the state, it may also exact wharfage fees equally from all who use its improved wharves, provided such charges do not exceed what is fair remuneration for the use of its property. *Packet Co. v. St. Louis*, 100 U. S., 423; *Vicksburg v. Tobin*, 100 U. S., 430 (§§ 1429–30, *infra*); *Packet Co. v. Keokuk*, 95 U. S., 80 (§§ 1420–23, *infra*). But it cannot employ the property it thus holds for public use so as to hinder, obstruct or burden interstate commerce in the interest of commerce wholly internal to that state. The fees which it exacts to that end, although denominated wharfage dues, cannot be regarded, in the sense of our former decisions, as compensation merely for the use of the city's property, but as a mere expedient or device to accomplish, by indirection, what the state could not accomplish by a direct tax, viz., build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states. Such exactions, in the name of wharfage, must be regarded as taxation upon interstate commerce. Municipal corporations, owning wharves upon the public navigable waters of the United States, and *quasi* public corporations transporting the products of the country, cannot be permitted by discriminations of that character to impede commercial intercourse and traffic among the several states and with foreign nations.

§ 1399. *How far a state may exclude products of other states.*

In the exercise of its police powers, a state may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or prop-

erty of its people. But if the state, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles of that kind that may be produced or manufactured in other states, the courts would find no difficulty in holding such legislation to be in conflict with the constitution of the United States.

§ 1400. *Extent of the federal power to regulate commerce.*

The power of the national government over commerce with foreign nations and among the several states is broad and comprehensive. It reaches the interior of every state of the Union, so far as it may be necessary to protect the products of other states and countries from discrimination by reason of their foreign origin. *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*). Nothing can be clearer than that the statute of Maryland and the ordinance of the city of Baltimore, in the respects adverted to, are in conflict with the power of congress over the subject of commerce.

The judgment is reversed, with directions to dismiss the action against the appellant, with his costs against the city.

MR. CHIEF JUSTICE WAITE dissented.

§ 1401. *Peddlers' license tax.*—The statute of Nevada providing "that every traveling merchant, agent, drummer or other person selling, or offering to sell, any goods, wares or merchandise of any kind, to be delivered at some future time," shall pay a license of \$25 per month, there being no discrimination against the goods of other states in favor of the products of Nevada, is a legitimate exercise of the taxing power of the state, and does not violate the constitutional provision conferring upon congress the power to regulate commerce among the states, when applied to drummers traveling for merchants of other states. Nor does this statute violate the clause forbidding the states to lay imposts or duties on imports. *In re Rudolph*,\* 6 Saw., 295. See §§ 1373, 1375.

§ 1402. *Liquor license.*—The exaction by a city ordinance of a license tax for the privilege of selling, by the cask, in the city, ale or beer not manufactured in that city, but brought there, is no violation of either that constitutional clause which gives to congress the power to regulate commerce with foreign nations and among the states, or that clause which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, unless it appears that the beer or ale taxed has been brought from a foreign country or another state. *Downham v. Alexandria Council*,\* 10 Wall., 173. See § 1377.

§ 1403. A state tax on liquors, the product of other states, but which does not discriminate in favor of the products of the state imposing the tax, is not a regulation of commerce within the constitutional inhibition. *Hinson v. Lott*,\* 8 Wall., 149.

### *Duties on Tonnage.*

SUMMARY — *Constitutional provision*, § 1404. — *Charges for use of wharf*, §§ 1405-1413; *based on tonnage of vessel*, §§ 1407, 1408, 1410, 1411, 1413; *law requiring vessels to land at wharf*, § 1412. — *Tax on vessels owned in other states*, §§ 1414, 1415.

§ 1404. "No state shall, without the consent of congress, lay any duty of tonnage." Const., art. I, sec. 10.

§ 1405. A tax of so much per ton on all vessels landing at any part of a port cannot be regarded as a tax for the use of the wharf, but is a tax on tonnage, and is, therefore, unconstitutional. *Cannon v. New Orleans*, §§ 1416-17. See §§ 1378, 1437.

§ 1406. Vessels may be required to pay a fair compensation for the use of a wharf; but in the exercise of this right by cities, care must be had that it is not made to cover a violation of the federal constitution. *Ibid*.

§ 1407. A state law which requires vessels entering the port, or which load or unload, or make fast to any wharf therein, to pay a fee of a certain percentage per ton, to be computed from the tonnage expressed in the registers of enrollments of the vessels, is repugnant to the constitutional inhibition against duties on tonnage. *Inman Steamship Co. v. Tinker*, §§ 1418-19.

§ 1408. A municipal corporation of a state, having by the law of its organization an exclusive right to make wharves, collect wharfage, and regulate wharfage rates, can, consistently with the constitution of the United States, charge and collect wharfage proportioned to the tonnage of the vessels from the owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river. *Packet Co. v. Keokuk*, §§ 1420-23.

§ 1409. If that part of a law which exacts wharfage dues can be severed from a part which is unconstitutional, it will be upheld. *Ibid.*

§ 1410. A charge for the use of a wharf, based on the tonnage of the vessels, is not necessarily a duty on tonnage. *Ibid.*

§ 1411. An ordinance of a city requiring all vessels to land at a designated wharf, and to pay a reasonable wharfage proportioned to the tonnage of the vessels, is not unconstitutional. *Packet Co. v. Catlettsburg*, §§ 1424-28.

§ 1412. If a law requiring vessels to land at a wharf, and imposing a penalty for landing at any other place, is a regulation of commerce, it is such a regulation as the states may make until congress acts upon the subject. *Ibid.*

§ 1413. The city of Vicksburg exacted from all vessels landing at the city certain rates for the use of the wharf proportioned on the tonnage of the vessels. The charges were not made for the privilege of entering or remaining at the port, but as a compensation for the use of the wharf. *Held*, that this was not an unwarrantable regulation of interstate commerce, nor a duty on tonnage. *Vicksburg v. Tobin*, §§ 1429-30.

§ 1414. Taxes levied by a state upon ships and vessels owned by the citizens of the state as property, based on a valuation of the same as property, are not within the prohibition of the constitution; but taxes imposed upon such vessels at so much per ton of their registered tonnage are within the provision of the constitution which prohibits the states from laying duties on tonnage. *State Tonnage Tax Cases*, §§ 1431-36.

§ 1415. And it is not material that the vessels are employed in commerce between ports and places in the state imposing the tax. *Ibid.*

[NOTES.—See §§ 1437-1443.]

#### CANNON v. NEW ORLEANS.

(20 Wallace, 577-583. 1874.)

ERROR to the Supreme Court of Louisiana.

STATEMENT OF FACTS.—An ordinance of the city of New Orleans provided that the levee and wharfage dues on all steamboats which should moor or land in any part of the port of New Orleans should be a certain amount per ton if in port not exceeding five days, a certain sum per day after the expiration of five days, and that boats making three trips per week should pay a certain amount per ton each trip. Cannon filed a petition to recover back money paid under this ordinance, and to enjoin any further collections. The state court held the ordinance valid.

Opinion by MR. JUSTICE MILLER.

This writ of error is based upon the proposition that the city ordinance is in conflict with two clauses of the constitution of the United States, namely, that which grants to congress the right to regulate commerce with foreign nations, among the states, and with the Indian tribes; and that which forbids the states to levy any duty of tonnage without the consent of congress. We shall only consider the question raised by the latter clause.

§ 1416. *A tax, measured by tonnage of vessels, upon every one that comes to a port, irrespective of the use of wharves, etc., is a "duty upon tonnage," and the ordinance authorizing it is unconstitutional.*

It is argued in support of the validity of the ordinance that the money collected under it is only a compensation for the use of the wharves which are owned by the city, and which have been built and are kept in repair by the city corporation. Under the evidence in this case of the condition of the levee and banks of the Mississippi river within the limits of the city, to which the

language of the ordinance must be applied, this contention cannot be sustained. It is in proof that of the twenty miles and more of the levee and banks of the Mississippi within the city, not more than one-tenth has any wharf, and that vessels land at various places where no such accommodations exist. The language of the ordinance covers landing anywhere within the city limits. The tax is, therefore, collectible for vessels which land at any point on the banks of the river, without regard to the existence of the wharves. The tax is also the same for a vessel which is moored in any part of the port of New Orleans, whether she ties up to a wharf or not, or is located at the shore or in the middle of the river. A tax which is, by its terms, due from all vessels arriving and stopping in a port, without regard to the place where they may stop, whether it be in the channel of the stream, or out in a bay, or landed at a natural river bank, cannot be treated as a compensation for the use of a wharf. This view is additionally enforced if, as stated by counsel for the plaintiff, in their argument, the supreme court of the state has decided that, under the act of 1843 of the Louisiana legislature, no wharfage tax or duty can be levied or collected by the city.

We are of opinion that upon the face of the ordinance itself, as applied to the recognized condition of the river and its banks within the city, the dues here claimed cannot be supported as a compensation for the use of the city's wharves, but that it is a tax upon every vessel which stops, either by landing or mooring in the waters of the Mississippi river within the city of New Orleans, for the privilege of so landing or mooring. In this view of the subject, as the assessment of the tax is measured by the tonnage of the vessel, it falls directly within the prohibition of the constitution, namely, "that no state shall, without the consent of congress, lay any duty of tonnage." Whatever more general or more limited view may be entertained of the true meaning of this clause, it is perfectly clear that a duty or tax or burden imposed under the authority of the state, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition.

There have been several cases before this court involving the construction of this provision. The more recent and well considered of these are *Steamship Co. v. Portwardens*, 6 Wall., 31 (§§ 1535-38, *infra*); *State Tonnage Tax Cases*, 12 id., 212 (§§ 1431-36, *infra*); and *Peete v. Morgan*, 19 id., 581. In the first of these cases the late chief justice, who delivered the opinion, seemed inclined to guard against too narrow a construction of the clause, lest its spirit and purpose might be evaded. He says, "that in the most obvious and general sense, it is true, the words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition against laying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty on tonnage. It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty." The other two cases fully sustain the proposition as we have stated it.

§ 1417. *Vessels may be required to pay for the use of a wharf.*

In saying this we do not understand that this principle interposes any hin-

drance to the recovery from any vessel landing at a wharf or pier, owned by an individual or by a municipal or other corporation, a just compensation for the use of such property. It is a doctrine too well settled, and a practice too common and too essential to the interests of commerce and navigation, to admit of a doubt, that for the use of such structures, erected by *individual* enterprise, and recognized everywhere as private property, a reasonable compensation can be exacted. And it may be safely admitted, also, that it is within the power of the state to regulate this compensation, so as to prevent extortion, a power which is often very properly delegated to the local municipal authority. Nor do we see any reason why, when a city or other municipality is the owner of such structures, built by its own money, to assist vessels landing within its limits in the pursuit of their business, the city should not be allowed to exact and receive this reasonable compensation as well as individuals. But in the exercise of this right care must be had that it is not made to cover a violation of the federal constitution in the point under consideration. We are better satisfied with this construction of the constitution from the fact that this is one of the few limitations of that instrument on the power of the states which is not absolute, but which may be removed wholly or modified by the consent of congress.

The cases which have recently come before this court, in which the state by itself or by one of its municipalities has attempted to levy taxes of this character, clearly within the letter and the spirit of the constitutional prohibition, show the necessity of a rigid adherence to the demands of that instrument. If hardships arise in the enforcement of this principle, and the just necessities of a local commerce require a tax which is otherwise forbidden, it is presumed that congress would not withhold its assent if properly informed and its consent requested. This is a much wiser course, and congress is a much safer depository of the final exercise of this important power than the ill-regulated and overtaxed towns and cities, which are not likely to look much beyond their own needs and their own interests. We are of opinion that the ordinance under which the levee dues were assessed upon the plaintiff's vessel is unconstitutional and void.

Judgment reversed, and the case remanded to the supreme court of Louisiana for further proceedings in conformity to this opinion.

#### INMAN STEAMSHIP COMPANY v. TINKER.

(4 Otto, 238-245. 1876.)

APPEAL from U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is a bill in equity brought to enjoin the appellee from collecting a port charge imposed upon the vessels of the appellant in the harbor of New York, by an act of the legislature of the state, a copy of which is annexed to the bill, and made a part of it. The bill sets forth the following facts: The appellant is a foreign corporation, and the owner of three steamships, each of which enters the port of New York once within every five weeks. The vessels are respectively of the burden of two thousand nine hundred and fifty tons, two thousand eight hundred and twenty-three tons, and of two thousand seven hundred and twelve tons. All these vessels belong to the port of Liverpool, in England, and run between that port and the port of New York. The character and object of the act of the legislature complained of are indi-

cated in its title, which is, "An act defining and regulating the powers, duties and compensation of the captain of the port and harbor-masters of the port of New York, passed May 22, 1862, three-fifths being present; amended April 17, 1865." The sixth section declares: "The following fees shall be collected under this act, and no others: All ships or vessels of the United States of one hundred tons burden or more, except lighters, tugs, barges and canal-boats, sound and river steamboats employed on regular lines, and all ships or vessels that are permitted by the laws of the United States to enter on the same terms as vessels of the United States, which shall enter the port of New York, or load or unload, or make fast to any wharf therein, shall pay one and one-half of one cent per ton, to be computed from the tonnage expressed in the registers of enrollments of such ships or vessels respectively; and all other foreign ships which shall arrive at and enter the same port, and load or unload, or make fast to any wharf therein, shall pay three cents per ton, to be computed on the tonnage expressed in the registers or documents on board," etc.

In default of payment as prescribed, it is declared that the master, owner or consignee, upon whom demand of payment may have been made, shall pay double the amount of such fees, to be recovered in the name of the captain of the port. The amount which the appellant was required to pay, and did pay, was one cent and a half per ton upon the tonnage of their three vessels respectively upon every arrival of each one in the American port. The bill seeks to relieve them from this burden in future. The respondent demurred to the bill in the court below. The demurrer was sustained, and the bill dismissed. The case was thereupon removed to this court by appeal.

The following clauses of the constitution of the United States are invoked in behalf of the appellant as sustaining the bill: Art. 1, sec. 10. "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the congress." "No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

§ 1418. *A fee collected on the tonnage of each vessel entering a port, or loading or unloading therein, etc., is a duty on tonnage.*

It is not claimed that congress ever consented to the passage of the act of 1862, or the amendatory act of 1865. It is insisted by the counsel for the appellant that the charge here in question is a regulation of commerce, which it was not competent for the state to prescribe, and also a tonnage duty, which the state was forbidden to impose. Our remarks will be confined to the latter proposition.

The classification of the powers of the national government, the several categories into which they may be resolved, and the rights and powers of the states in our complex system of polity, have been so often considered by this court, that it is unnecessary upon this occasion to re-examine the subject. *Gilman v. Philadelphia*, 3 Wall., 713 (§§ 1164-70, *supra*); *Ex parte McNeil*, 13 id., 236. Tonnage, in our law, is a vessel's "internal cubical capacity in tons of one hundred cubic feet each, to be ascertained" in the manner prescribed by congress. Act of May 6, 1864 (13 Stat., pp. 70, 72); R. S. U. S., 804, § 4153.

"Tonnage duties are duties upon vessels in proportion to their capacity." Bouv. Law Dict., "Tonnage." The term was formerly applied to merchandise. Cowel, in his Law Dictionary, published in 1708, thus defines it: "Tonnage (*tonnagium*) is a custom or impost paid to the king for merchandise carried out or brought in ships, or such like vessels, according to a certain rate upon every ton, and of this you may read in the statutes of 12 Edw. IV., c. 3; 6 Hen. VIII., c. 14," etc. The vital principle of such a tax or duty is that it is imposed, whatever the subject, solely according to the rule of weight, either as to the capacity to carry or the actual weight of the thing itself.

In this law of the state there are several important points that must not be overlooked. The charge is not exacted for any services rendered or offered to be rendered. If the vessel enter the port and immediately take her departure, or load or unload, or make fast to any wharf, either of these things disjunctively brings her within the act, and makes her liable to the burden prescribed. The charge is applied wholly irrespective of the *ad valorem* principle. If either of the three vessels of the appellant was new and making her first voyage, and another of the same tonnage was making her last trip before being broken up, and the former were of many times the value of the latter, the act would apply the same procrustean rule to both. The rate of payment and the amount to be paid would in both cases be the same.

The act makes a discrimination. To one class of vessels it applies the rate here in question, to another class double that rate, and to yet another class none at all. Those belonging to the latter are wholly exempted. We think a clearer case of the imposition of a tonnage duty than is presented in the record before us can hardly be imagined. If the law had been passed by congress instead of the state, and the charge imposed had been expressly designated a *tonnage* duty, its character as such could not appear in a stronger light. But the name is immaterial: it is the substance we are to consider.

§ 1419. *Port charges are authorized under the police power of the states, but they must not amount to a duty on tonnage.*

It does not advance the argument in behalf of the appellee to maintain that the regulations prescribed by the act are necessary and proper in the port for which they are provided. It is not our purpose to examine them, except as to the proposition in hand. It may be that, aside from the imposition of this tax, they contain nothing exceptionable, and that in all other respects they are wise and well considered. Similar provisions, varying according to local circumstances, exist at all important points throughout the world whither marine commerce finds its way. They are indispensable to those engaged in that business. They fence out many evils, and promote largely the convenience and the welfare of those engaged in this field of enterprise. Perhaps it is hardly too strong language to say they are well nigh vital to commerce itself. It may be conceded also that foreign steamships and other vessels visiting the ports of a state for business purposes may be made liable by the laws of such state for all reasonable and proper port charges. This is but a fair return for the benefits received. But such charges must not be repugnant to the constitution of the United States. Any conflict is fatal to them. The warrant for such competent legislation may be found in that immense mass of police and other powers which the states originally possessed, which they have not parted with, and which still belongs to them; or it may in some cases be found among those which the states may exercise, but only until congress shall see fit to act upon the subject. The authority of the state then retires, and lies in abeyance

until the occasion for its exercise shall recur. *Ex parte McNeil*, 13 Wall., 236.

"Powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Const., amend. 10. The state, in passing this law imposing a tonnage duty, has exercised a power expressly prohibited to it by the constitution. In that particular the law is therefore void. This view is sustained by the rulings of this court in *The State Tonnage Tax Cases*, 12 Wall., 204 (§§ 1431-36, *infra*), and *Cannon v. New Orleans*, 20 id., 577 (§§ 1416, 1417, *supra*). See, also, *Steamship Co. v. Portwardens*, 6 id., 31 (§§ 1535-38, *infra*), and *Peete v. Morgan*, 19 id., 581. The tax imposed is not merely a mode of measuring the compensation to be paid. The answer to this suggestion is that it is exacted where there is nothing to be paid for, and has no reference to any circumstance in this connection but the tonnage of the vessel and the class to which it belongs.

The commerce clauses of the constitution had their origin in a wise and salutary policy. They give to congress the entire control of the foreign and interstate commerce of the country. They were intended to secure harmony and uniformity in the regulations by which they should be governed. Wherever such commerce goes, the power of the nation accompanies it, ready and competent, as far as possible, to promote its prosperity and redress the wrongs and evils to which it may be subjected. It was deemed especially important that the states should not impose tonnage taxes. Hence the prohibition in the constitution without the assent of congress previously given. The confusion and mischiefs that would ensue if this restriction were removed are too obvious to require comment. The lesson upon the subject, taught by the law before us, is an impressive one. How the charges, which it is conceded the state may impose, must be shaped in order to be valid, is a subject which it is not within our province to consider, and in regard to which it would not be proper for us to express any opinion. We decide only the point before us.

Decree reversed and cause remanded, with directions to proceed in conformity to this opinion.

MR. CHIEF JUSTICE WAITE did not sit in this case.

#### PACKET COMPANY v. KEOKUK.

(5 Otto, 80-89. 1877.)

ERROR to the Supreme Court of Iowa.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The principal question presented by the record of this case is, whether a municipal corporation of a state, having by the law of its organization an exclusive right to make wharves, collect wharfage and regulate wharfage rates, can, consistently with the constitution of the United States, charge and collect wharfage proportioned to the tonnage of the vessels from the owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river.

§ 1420. *A charge for wharfage is not a tonnage duty in any sense; it is a reasonable charge for an accommodation.*

The city of Keokuk is such a corporation, existing by virtue of a special charter granted by the legislature of Iowa. To determine whether the charge



prescribed by the ordinance in question is a duty of tonnage, within the meaning of the constitution, it is necessary to observe carefully its object and essence. If the charge is clearly a duty, a tax or burden, which in its essence is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing from it, imposed, as it is, by authority of the state, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty. But a charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation. The prohibition to the state against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited: something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by a state, a municipal corporation or a private individual; and, when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property. A passing vessel may use the wharf or not, at its election, and thus may incur liability for wharfage or not, at the choice of the master or owner. No one would claim that a demand of compensation for the use of a dry-dock for repairing a vessel, or a demand for towage in a harbor, would be a demand of a tonnage tax, no matter whether the dock was the property of a private individual or of a state, and no matter whether proportioned or not to the size or tonnage of the vessel. There is no essential difference between such a demand and one for the use of a wharf. It has always been held that wharfage dues may be exacted; and it is believed that they have been collected in ports where the wharves have belonged to the state or a municipal corporation ever since the adoption of the constitution. In *Cannon v. New Orleans*, 20 Wall., 577 (§§ 1416-17, *supra*), this court, while holding an ordinance void that fixed dues upon steamboats which should moor or land in any part of the port of New Orleans, measured by the number of tons of the boats, because substantially a tax for the privilege of stopping in the port, and, therefore, a duty on tonnage, carefully guarded the right to exact wharfage. The language of the court was: "In saying this (namely, denying the validity of the ordinance then before it), we do not understand that this principle interposes any hindrance to the recovery from any vessel landing at a wharf or pier owned by an individual, or by a municipal or other corporation, a just compensation for the use of such property. It is a doctrine too well settled, and a practice too common and too essential to the interests of commerce and navigation, to admit of a doubt, that for the use of such structures, erected by individual enterprise and recognized everywhere as private property, a reasonable compensation can be exacted. And it may be safely admitted, also, that it is within the power of the state to regulate this compensation, so as to prevent extortion, a power which is often very properly delegated to the local municipal authority. Nor do we see any reason why, when a city or other municipality is the owner of such structures, built by its own money, to assist vessels landing within its limits in the pursuit of their business, the city should not be allowed to exact and receive this reasonable compensation as well as individuals."

§ 1421. *Distinction between tonnage duties and wharfage charges.*

No doubt, neither a state nor a municipal corporation can be permitted to impose a tax upon tonnage under cover of laws or ordinances ostensibly passed to collect wharfage. This has sometimes been attempted, but the ordinances will always be carefully scrutinized. In *Cannon v. New Orleans*, the ordinance was held invalid, not because the charge was for wharfage, nor even because it was proportioned to the tonnage of the vessels, but because the charge was not for wharfage or any service rendered. It was for stopping in the harbor, though no wharf was used. Such, also, was *Northwestern Packet Co. v. St. Paul*, 3 Dill., 454. So, in *Steamship Co. v. Portwardens*, 6 Wall., 31 (§§ 1535-38, *infra*), the statute held void imposed a tax upon every ship entering the port. This was held to be alike a regulation of commerce and a duty of tonnage. It was a sovereign exaction, not a charge for compensation. Of the same character was the tax held prohibited in *Peete v. Morgan*, 19 id., 581.

§ 1422. *A charge based on the tonnage of the vessel is not necessarily a tonnage duty.*

It is insisted, however, on behalf of the plaintiffs in error, that the charge prescribed by the ordinance must be considered as an imposition of a duty of tonnage, because it is regulated by and proportioned to the number of tons of the vessels using the wharf; and the argument is attempted to be supported by the ruling of this court in *State Tonnage Tax Cases*, 12 Wall., 204 (§§ 1431-36, *infra*). But this is a misconception of those cases. The statute of Alabama declared invalid was not a provision to secure or regulate compensation for wharfage, or for any services rendered to the vessels taxed. It imposed a tax "upon all steamboats, vessels and other water-crafts plying in the navigable waters of the state," to be levied "at the rate of \$1 per ton of the registered tonnage thereof." It did not tax the boats as property in proportion to their value, but according to their capacity, or, as was said, "solely and exclusively on the basis of their cubical contents, as ascertained by the rules of admeasurement and computation prescribed by congress." It was the nature of the tax or duty, coupled with the mode of assessing it, which made the law a violation of the constitution. As stated, the vessels taxed were such as were plying in the navigable waters of the state. If not plying in those waters, they were not taxed. The tax was, therefore, an impediment to navigation in those waters, which led the court to say that it was as instruments of commerce, and not as property, the vessels were required to contribute to the revenues of the state. The fact that the tax was proportioned to the tonnage of the vessels taxed was relied upon only as supporting the conclusion that they were not taxed as property, but as instruments of commerce; and the court, in view of all these considerations, remarked: "Beyond all question, the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed, or to the ship-owners, and consequently it is not to be upheld by virtue of the rules applied in the construction of laws regulating pilot dues and port charges." Nothing in these cases justifies the assertion that either wharfage or port charges are duties of tonnage, merely because they are proportioned to the actual tonnage or cubical capacity of vessels. It would be a strange misconception of the purpose of the framers of the constitution were its provisions thus understood. What was intended by the provisions of the second clause of the tenth section of the first article was to protect the freedom of commerce, and nothing more. The prohibition of a duty of tonnage should, therefore, be construed so as to carry out that intent. A mere

adherence to the letter, without reference to the spirit and purpose, may, in this case, mislead, as it has misled in other cases. It cannot be thought the framers of the constitution, when they drafted the prohibition, had in mind charges for services rendered or for conveniences furnished to vessels in port, which are facilities to commerce, rather than hindrances to its freedom; and, if such charges were not in mind, the mode of ascertaining their reasonable amount could not have been. In *Cooley v. Board of Wardens*, 12 How., 299 (§§ 1541-47, *infra*), this court recognized a clear distinction between wharfage and duties on imports or exports, or duties on tonnage. Referring to the second paragraph of section 10, article 1, of the constitution, Curtis, J., speaking for the court, said: "This provision of the constitution was intended to operate upon subjects actually existing and well understood when the constitution was formed. Imposts and duties on imports, exports and tonnage were then known to the commerce of the civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial states enforced their laws, as they were from charges for wharfage or towage, or any other local port charges for services rendered to vessels or cargoes; and to declare that such pilot fees or penalties are embraced within the words impost, or duties on imports, exports, or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language. . . . It is the thing, and not the name, that is to be considered."

For these reasons, we hold that the ordinance cannot be considered as imposing a duty of tonnage; and what we have said is sufficient to show that most of the other objections of the plaintiffs in error to its validity have no substantial foundation. It is in no sense a regulation of commerce between the states, nor does it impose duties upon vessels bound to or from one state to another, nor compel entry or clearance in the port of Keokuk; nor is it contrary to the compact contained in the ordinance of 1787, since it levies no tax for the navigation of the river; nor is it in conflict with the act of congress respecting the enrollment and license of vessels for the coasting trade. All these objections rest on the mistaken assumption that port charges, and especially wharfage, are taxes, duties, and restraints of commerce.

§ 1423. *Statutes constitutional in part will be upheld to that extent.*

In nothing that we have said do we mean to be understood as affirming that a city can, by ordinance or otherwise, charge or collect wharfage for merely entering its port, or stopping therein, or for the use of that which is not a wharf, but merely the natural and unimproved shore of a navigable river. Such a question does not arise in this case. The record shows that the wharfage charged to these plaintiffs in error was for the use of a wharf, built, paved and improved by the city at large expense. So far as the ordinance imposes and regulates such a charge, it is not obnoxious to the accusation that it is in conflict with the constitution. A different question would be presented had the steamboats landed at the bank of the river where no wharf had been constructed or improvement made to afford facilities for receiving or discharging cargoes. We adhere to all that was decided in *Cannon v. New Orleans*. In that case, the city ordinance imposed what were called "levee dues" on all steamboats that should moor or land in any part of the harbor of New Orleans. It was subsequently amended by the substitution of the words "levee and wharfage dues" for "levee dues;" but, even as amended, it did not profess to demand wharfage. The plaintiff filed a petition for an injunction against the

collection of the dues prescribed by it, and for the recovery of those he had been compelled to pay. It did not appear that he had ever made use of any wharf or improved levee; and what we decided was, that the city could not impose a charge for merely stopping in the harbor. The case in hand is different. The ordinance of Keokuk has imposed no charge upon these plaintiffs which it was beyond the power of the city to impose. To the extent to which they are affected by it there is no valid objection to it. Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case. It may be conceded the ordinance is too broad, and that some of its provisions are unwarranted. When those provisions are attempted to be enforced, a different question may be presented.

*Judgment affirmed.*

PACKET COMPANY v. CATLETTSBURG.

(15 Otto, 559-565. 1881.)

APPEAL from U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—This was a suit in chancery brought by the Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company against the board of trustees of the town of Catlettsburg.

The bill is very inartificially drawn, and its allegations very imperfectly present some of the questions which, by the brief of counsel, it is supposed to have raised. It alleges the complainant to be a corporation, owning a large number of steamboats engaged in the navigation of the Ohio river, and making frequent landings at the public wharf of the town of Catlettsburg, on the Kentucky side of that river. That upon each of said landings they were subjected to an illegal tax proportioned to the tonnage of each of said boats, amounting, between January 1, 1870, and April 30, 1877, to an aggregate sum of \$5,092. Parts of the ordinance of the town under which this tax was collected, and of the statute of Kentucky supposed to authorize the ordinance are set out in the bill. This ordinance is alleged to be void as a regulation of commerce, and as laying a duty of tonnage forbidden by section 10 of the first article of the constitution. The bill then alleges that the tax is excessive and beyond a reasonable charge for the use of the wharf by the boats of the complainant, and that the amount already collected exceeds the cost of erecting and preserving the wharf. An amended bill was also filed, which does not materially affect the matters in issue.

The thirty-first section of the act of the Kentucky legislature of January 28, 1868, incorporating the town of Catlettsburg, authorizes the board of trustees "to erect, make and repair wharves and docks, and to regulate and fix the rate of wharfage thereat; to regulate the stationing or anchoring of vessels or boats or rafts within the town limits, and the depositing freight or lumber on the public wharves." The ordinances of the town complained of are the following, enacted February 23, 1871: "The following rates are established as charges upon steamboats and other water-crafts landing at the public landing of Catlettsburg, Ky.: On transient steamboats, \$1 for every landing; on the largest-sized regular packets, over one hundred tons, custom-house measure, \$1 for each landing; and on all steamboats under one hundred tons burthen, fifty cents for each landing; for all store-boats or trading-boats, \$1 for each landing, and if

they remain more than one day, fifty cents per day for each day they remain; and for each wharf-boat used for the purpose of wharfage and commission, \$10 per month."

And another, adopted by said board of trustees May 5, 1873, in the following words: "That the public landing on the Ohio river, between Division and Main streets, is hereby appointed and established as a steamboat landing, and all steamboats arriving at the town of Catlettsburg shall land at the wharf situate as aforesaid between Division street and Main street, and at no other point within the corporate limits of the town of Catlettsburg, except by the written consent of the wharf-master of said town. That for any violation of the foregoing section the owners, controllers or masters of any boat so violating shall be jointly and severally liable to pay a fine of \$10 for each offense, which may be recovered by warrant in the name of the commonwealth of Kentucky, for the use of the board of trustees of the town of Catlettsburg. It is hereby made the duty of the wharf-master to enforce this ordinance, and to report and prosecute all violations thereof."

The prayer of the bill is for an injunction restraining the defendants from the collection of all taxes from the complainant's boats while landing at the natural and unimproved shore of the Ohio river, and at points other than the improved landing of the defendants, between Division and Main streets, and from the collection of all excessive taxes while landing at *any* point within the corporate limits, and from the enforcement of the ordinance requiring them to land at the defendants' improved wharf, between Division and Main streets; and the original bill prayed a decree for the sums improperly exacted of complainant. The court below held, on demurrer to the original bill, that there could be no recovery in this suit for the amount illegally exacted and paid, because an action at law was the appropriate and adequate remedy for that purpose, and in that the court was probably right. If, however, the bill presents no ground for the injunction prayed, the prayer for recovery of a moneyed decree becomes immaterial.

§ 1424. *Wharfage is not a tax upon tonnage, although regulated by the size or tonnage of the vessel; so also of a penalty for landing at any place other than the wharf.*

The framer of the bill seems to have labored under a misapprehension of the nature of the transaction in calling the demands made of the complainant taxes. We can see nothing in the ordinances intended to impose a tax upon anybody. The bill, as we have said, is not very clear in its statements of the manner in which this money was paid or collected. It must, however, have been paid for the use of defendants' wharf or improved landing-place, in which case it is complained of as an excessive charge, or it must have been paid as a penalty for landing at other points than between Division and Main streets in violation of the ordinance. In neither case is there anything in the nature of a tax. The effort of the pleader undoubtedly is to bring the case within the constitutional prohibition of a tax upon tonnage. If, however, the trustees of the town had a right to compensation for the use of the improved landing or wharf which they had made, it is no objection to the ordinance fixing the amount of this compensation that it was measured by the size of the vessel, and that this size was ascertained by the tonnage of each vessel. It is idle, after the decisions we have made, to call this a tax upon tonnage. *Cannon v. New Orleans*, 20 Wall., 577 (§§ 1416-17, *supra*); *Packet Co. v. Keokuk*, 95 U. S., 80 (§§ 1420-23, *supra*); *Packet Co. v. St. Louis*, 100 id., 423; *Guy v. Baltimore*,

id., 434 (§§ 1394-1400, *supra*). Still less ground exists for holding that the penalties imposed for a refusal to obey the rules for places of landing, and the orders of the wharf-master on that subject, are taxes on tonnage.

§ 1425. *A city has a right to build and own wharves on navigable rivers and to exact compensation for wharfage.*

Nor is there any room to question the right of a city or town situated on navigable waters to build and own a wharf suitable for vessels to land at, and to exact a reasonable compensation for the facilities thus afforded to vessels by the use of such wharves, and that this is no infringement of the constitutional provisions concerning tonnage taxes and the regulation of commerce. See cases above cited.

§ 1426. *A city may require vessels to land at a certain place.*

There remains to be considered the validity of the ordinance which forbids the landing of vessels, except by the permission of the wharf-master, at any other point within the town than between Division and Main streets, and the question of excessive charges for the use of the wharf. There can be no doubt that the rules which govern the landing and departure of vessels at points situated on navigable waters may seriously affect them in their business of navigation and transportation, and in some sense such rules are regulations of commerce. On the other hand, the necessity is obvious of the existence in each port, where vessels as large as steamboats land at the shore and deposit their cargoes on the banks of navigable streams, of some authority to prescribe the places where this may be done, the time of doing it, and the points at which they may discharge cargo, both as relates to the streets, shores, houses of the town, and other vessels landing at the same time.

The protection of the shore of the sea or bank of a river on which a town is situated is a necessity to the town, and the washing and crumbling of the bank from the agitation of the waters, made by the landing of large steamers, demand that such regulations should exist. Small vessels, without steam, rafts, flat-boats, keel-boats, loaded to their very utmost capacity, and liable to be sunk by the waves which accompany the landing of large steamboats, have the same right to land at the shore that steamers have, and they have a right to protection against their powerful competitors for trade. This can best be secured by appropriate regulations prescribing places for the landing of each, and in some instances placing the matter under the control of a wharf-master or other officer, whose duty it shall be to look after it. Such rules and regulations and such an officer exist in every place where the number of the inhabitants or the amount of the water-borne commerce justifies or requires it. The necessity for the existence of this power cannot be doubted.

§ 1427. *Where congress has not made any regulation concerning wharfage, it is competent for the states to do so directly or through municipal corporations.*

We are not aware that in any instance congress has attempted to exercise it. If it be a regulation of commerce under the power conferred on congress by the constitution, that body has signally failed to provide any such regulation. It belongs also, manifestly, to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing-places, can be properly made. If a regulation of commerce at all, it comes within that class in which the states may prescribe rules until congress assumes to do so. *Cooley v. Board of Wardens*, 12 How., 299 (§§ 1541-47, *infra*); *Gilman v. Philadelphia*, 3 Wall., 713 (§§ 1164-70, *supra*); *Crandall v. State of Nevada*, 6

id., 35 (§§ 1269-73, *supra*); *Pound v. Turck*, 95 U. S., 459 (§§ 1171-73, *supra*). There is probably not a city or large town in the United States, situated on a navigable water, where ordinances, rules and regulations like those of the town of Catlettsburg are not made and imposed by authority derived from state legislation, and the long acquiescence in this exercise of the power, and its absolute necessity, are arguments almost conclusive in favor of its rightful existence. We are of opinion that there is nothing in the ordinances of the town of Catlettsburg complained of, authorized as they clearly are by the statute of Kentucky, which is repugnant to the constitution of the United States.

§ 1428. — *but if the exercise of this power becomes oppressive, this court will interfere.*

But while the authority to make such regulations may exist in the trustees of that town, it must be conceded that an oppressive abuse in the exercise of that power may present a case in which the proper court could give relief. If, for instance, while forbidding all boats to land elsewhere than at a designated and limited part of the shore, that space was too small to permit the landing at the same time of vessels whose business required it; or if, having assumed the obligation of providing appropriate and sufficient wharf accommodations and forbidden boats to land at any other place, there was in fact no proper landing-place provided, a court would find some remedy for such oppressive and arbitrary conduct.

But nothing in this bill implies that the landing-place pointed out by the ordinance is insufficient in dimensions or wanting in proper means of accommodating the business of the vessels using it. So, also, while the statute authorizes the trustees to establish the rates of wharfage, if the sum demanded for that service is so far beyond a reasonable compensation for the use of the city's wharf as to be oppressive, and an abuse of the power thus conferred, the courts could in some way give appropriate relief, and it is this part of appellant's case which presents the only difficult question for our consideration.

We do not feel justified, however, on the allegations of this bill, in reversing the order of the circuit court, sustaining a demurrer to it, for several reasons. In the first place, the bill is manifestly founded on the idea of the unconstitutionality of these ordinances, and an injunction is asked to restrain defendants from interfering with the landing anywhere within the city limits of appellant's boats, and in general from enforcing the obnoxious ordinances. There is, it is true, a prayer to restrain them from the collection of all *excessive taxes* while their boats are landing within the corporate limits; but what is excessive or what is reasonable is not shown, and, as we have already said, the money collected is not taxes in any sense whatever.

In the next place, the bill does not show how or why the sums paid for the use of the wharf, or for landing at other places, are excessive. The one reason for so charging which is given is evidently fallacious; namely, that the town has already raised enough money from the use of the wharf to pay for its construction and preservation. The compensation which either the city or private owner of a wharf is entitled to receive is not to be based exclusively on a reimbursement of the cost of the wharf, and no such criterion can govern in the matter.

The ordinance establishing these rates and penalties is given in the bill, and has been copied in this opinion. It is by no means apparent that they are excessive. When it is considered that the wharf needs constant repair and

care; that the compensation of a wharf-master, who must be always ready to locate the vessels and collect the charges, is to be paid; and that the character and extent of the improvements are not shown, it would seem that something more than characterizing those rates as excessive is needed to invoke the restraining power of a court of equity. It is not alleged that they are oppressive, or an abuse of the power confided to the trustees. No statement is made of what would be reasonable in the premises, and, consistently with the bill, the charge may be so little in excess of a just compensation as not to call for equitable relief. There is no hindrance to trying this question in an action at law, where the verdict of a jury or the judgment of the court in one or two cases would establish what is reasonable under the circumstances; and this being once established by the appropriate tribunal, the court of equity could restrain the excess.

We concur with the circuit judge, that no such case of oppressive use or clear abuse of the power properly conferred on the trustees in regard to wharfage charges is alleged by this bill as to justify the interposition of a court of equity.

*Decree affirmed.*

VICKSBURG v. TOBIN.

(10 Otto, 430-433. 1879.)

ERROR to U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—This writ of error involves the constitutional validity of an ordinance of the city of Vicksburg, passed July 12, 1865, entitled "An ordinance establishing the rate of wharfage to be collected from steamboats and other water-craft, landing and lying at the city of Vicksburg."

The ordinance declares that all steamboats "landing at this [that] city" shall pay wharfage at the following rates: All packets terminating their trips at the city, per week \$10; all steamboats under one thousand tons burthen, passing and repassing, for each landing, \$10; and, for each one exceeding one thousand tons, \$1 for every one hundred tons excess; circus or exhibition boats, \$5 per day. The ordinance further provides that, if the captain or officer in command of any steamboat or water-craft shall refuse to comply with its provisions, on conviction thereof he shall be charged \$100 for each landing thereafter, until the settlement of the litigated claim.

Within the six years immediately preceding the commencement of this action, the city of Vicksburg collected from the defendants in error (without protest or objection on their part, although they knew the rates established by the city) the sum of \$5,400, "for and on account," as the special verdict of the jury recites, "of wharfage for the landing of plaintiffs' [defendants in error] boats at the city landing of Vicksburg on the Mississippi, plaintiffs' boats being at the time engaged in the coasting trade on said river, between New Orleans and Vicksburg, and other ports above Vicksburg."

This action was instituted to recover from the city the sums thus exacted from the defendants in error. Judgment upon the special verdict of the jury was rendered against the city, to reverse which this writ of error is prosecuted. It appeared, upon the trial in the circuit court, that the corporation of Vicksburg has been the riparian owner of the city landing, on account of which these charges were made, since 1851; that the former owner uniformly col-



lected wharfage from steamboats stopping at said landing up to 1851, and that the city had done the same ever since that date, but at higher rates; that the landing is comprised in a river front in the city, covering a length of about eighteen hundred feet between high and low-water mark; that the landing is worth \$50,000, in the repair and improvement of which the city had expended, within the six years preceding the trial, \$40,000; that the only improvement made by the city at the landing was the grading and piling of the bank to prevent caving; that, although the landing was not paved or covered with plank, it was a good landing in dry weather, but too muddy in wet weather to use as a place of deposit for freight; that the annual net receipts by the city from the use of the landing did not exceed \$11,500; that the wharf and harbor-master demanded and received from each boat stopping at the city landing \$10, and no more, without reference to the tonnage of the boat or the time it lay at the landing. It was also in evidence that, during the whole period for which collections were made from defendants in error, the Merchants' Wharf-boat Association had a wharf-boat lying at the city landing, and, for the privilege of occupying the space necessary therefor, had paid the city \$2,000 per annum; that, during that period, the boats of the defendants in error had touched the city landing only about twenty times, upon all other occasions landing against or fastening to the boat of the Merchants' Association.

The record discloses other facts; but they do not seem to be material in the determination of the case. The judgment rests mainly upon the ground that the ordinance by virtue of which the money sued for was demanded and collected was in conflict, as well with the clause of the constitution of the United States conferring upon congress the power to regulate commerce among the states, as with the clause inhibiting the states from laying duties of tonnage.

§ 1429. *Charges for the use of a wharf are valid.*

This question is disposed of by the opinion just rendered in *Packet Company v. St. Louis*, 100 U. S., 423. It is, in substance, the same question as that decided in *Packet Co. v. Keokuk*, 95 U. S., 80 (§§ 1420-23, *supra*). The latter case had not been determined in this court when the judgment now complained of was rendered. Here, as in the cases concerning the ordinances of Keokuk and St. Louis, the sums sued for were exacted and received as wharfage-fees by way of compensation for the use of an improved wharf, purchased and maintained by a municipal corporation at its own cost, for the benefit of commerce and navigation. They were not exacted for the mere privilege of entering or remaining in or departing from the port of Vicksburg. The ordinance in question does not, therefore, entrench upon the power of congress to regulate commerce among the states, nor does it lay a duty of tonnage in the sense of the constitution.

It is contended that this ordinance, in explicit language, imposes a tax for merely landing *at the city*, and points on the shore where there may have been in fact no wharf. If the ordinance was susceptible of that construction, a question would be presented for our determination altogether different from the one before us. Clearly, the city could not collect wharfage for the use of the unimproved shore of the river, or for that which was not, in any fair business sense, a wharf. Here there was an improved wharf, and as such it was used by the boats of the defendants in error. The sums demanded were paid as and for wharfage dues, collectible under an ordinance which, rightly construed, only authorized the imposition of dues, by way of reasonable compen-

sation, for the use, not of the river shore in its natural condition, but of the wharves of the city, erected and maintained at public expense.

§ 1430. *The fact that the city granted to a wharf-boat association the right to use the city landing at a stipulated sum per annum does not exempt those vessels using the wharf-boats of such association from the duty of paying the city the regular wharfage rates.*

One other point deserves notice. The circumstance that the defendants in error paid the Merchants' Wharf-boat Association its regular charges for landing at or against its boat does not affect the right of the city to demand from vessels the wharfage dues prescribed by the ordinance in question. It does not appear that the city, by granting the privilege which it did to that association, waived or intended to surrender its claim for wharfage from vessels landing against the association wharf-boat. All freight received by or discharged from such vessels necessarily passed over the city's wharf to its destination. It is not to be presumed that the city intended, by the special privileges granted to the Merchants' Wharf-boat Association, to waive its claim for wharfage dues from vessels landing against that boat, and using the city's wharf.

In view of what has been said touching the validity of the city ordinance, it is unnecessary to inquire whether, had such ordinance been held to be unconstitutional, the defendants in error, under the evidence in this action, could recover back what they had paid without protest or objection, and with a full knowledge of all the facts. The judgment of the circuit court will be reversed, with directions to render judgment for the city upon the special verdict of the jury; and it is so ordered.

#### STATE TONNAGE TAX CASES.

• COX v. THE COLLECTOR — TRADE COMPANY v. THE COLLECTOR.

(12 Wallace, 204-226. 1870.)

ERROR to the Supreme Court of Alabama.

§ 1431. *Assumpsit the proper remedy to recover back money illegally exacted as taxes.*

Opinion by MR. JUSTICE CLIFFORD.

#### I. IN THE FIRST CASE.

*Assumpsit* for money had and received is an appropriate remedy to recover back moneys illegally exacted by a collector as taxes in all jurisdictions where no other remedy is given, unless the tax was voluntarily paid or some statutory conditions are annexed to the exercise of the right to sue which were unknown at common law. Where the party assessed voluntarily pays the tax he is without remedy in such an action; but if the tax is illegal or was erroneously assessed, and he paid it by compulsion of law, or under protest, or with notice that he intends to institute a suit to test the validity of the tax, he may recover it back in such an action, unless the legislative authority, in the jurisdiction where the tax was levied, has prescribed some other remedy or has annexed some other conditions to the exercise of the right to institute such a suit. *Elliott v. Swartwout*, 10 Pet., 150; *Bend v. Hoyt*, 13 id., 267.

STATEMENT OF FACTS.—On the 22d of February, 1866, the legislature of Alabama passed a revenue act, and therein, among other things, levied a tax "on all steamboats, vessels and other water-crafts plying in the navigable

waters of the state, at the rate of \$1 per ton of the registered tonnage thereof," to "be assessed and collected at the port where such vessels are registered, if practicable, otherwise at any other port or landing within the state where such vessel may be." Sess. Acts 1846, p. 7.

Five steamboats were owned by the plaintiffs, who were citizens of that state, doing business at Mobile under the firm name set forth in the record. All of the steamboats were duly enrolled and licensed in conformity to the act of congress entitled "An act for enrolling and licensing ships and vessels to be employed in the coasting trade of the United States," and the record shows that at the time the taxes, which are the subject of controversy, were imposed and collected, all those steamboats were engaged in the navigation of the Alabama, Bigbee and Mobile rivers, in the transportation of freight and passengers between the port of Mobile and other towns and landings on said rivers, within the limits of the state, the said rivers being "waters navigable from the sea by vessels of ten or more tons burden." 1 Stat. at Large, 77. Such steamboats are deemed ships and vessels of the United States, and as such are entitled to the privileges secured to such ships and vessels by the act of congress providing for enrolling and licensing ships and vessels to be employed in that trade. *Id.*, 305.

Annexed to the agreed statement exhibited in the record is a schedule of the taxes imposed and collected, in which are also given the names of the respective steamboats, their tonnage and their value, and the proportion assessed by the county as well as that imposed by the state. Committed as the assessments were to the same person to collect, it is immaterial whether the taxes were assessed for the state or for the county, as the collector demanded the whole amount of the plaintiffs, and they paid the same under protest, the sums specified as county taxes including also a charge made by the collector for fees in collecting the money. Separately stated the taxes were as follows: On the steamboat C. W. Dorrance, three hundred and twenty-one tons burden, valued at \$5,000, taxed, state tax \$321, county tax \$322.25; Flirt, tonnage two hundred and fourteen tons, valued at \$2,500, taxed, state tax \$214, county tax \$215.25; Cherokee, tonnage three hundred and ten tons, valued at \$15,500, taxed, state tax \$310, county tax \$311.25; Coquette, tonnage two hundred and forty-five tons, valued at \$4,000, taxed, state tax, \$245, county tax \$246.25; St. Charles, tonnage three hundred and thirty-one tons, valued at \$15,000, taxed, state tax \$331, county tax \$332.25; showing that the county tax as well as the state tax is \$1 per ton of the registered tonnage of the steamboats, exclusive of the fees charged by the collector.

Demand of the taxes having been made by the collector, the plaintiffs protested that the same were illegal, but they ultimately paid the same to prevent the collector from seizing the steamboats and selling the same in case they refused to pay the amount. They paid the sum of \$2,848.25 as the amount of the taxes, fees and expenses demanded by the defendant, and brought an action of *assumpsit* against the collector in the circuit court of the state for Mobile county to recover back the amount, upon the ground that the sum was illegally exacted. Judgment was rendered in that court for the plaintiffs, the court deciding that the facts disclosed in the agreed statement showed that the taxes were illegal, as having been levied in violation of the federal constitution. Appeal was taken by the defendant to the supreme court of the state, where the parties were again heard, but the supreme court of the state, differing in opinion from the circuit court where the suit was commenced, rendered judg-

ment for the defendant, whereupon the plaintiffs sued out a writ of error and removed the record into this court for re-examination.

I. Two principal objections were made to the taxes by the plaintiffs, as appears by the agreed statement, which is made a part of the record. (1) That the taxes as levied and collected were in direct contravention of the prohibition of the constitution, that "no state shall, without the consent of congress, levy any duty of tonnage," and the proposition of the plaintiffs was, and still is, that the act of the legislature of the state directs in express terms that such taxes shall be levied on all steamboats, vessels and other water-crafts plying in the navigable waters of the state. (2) That the state law levying the taxes violates the compact between the state and the United States, that "all navigable waters within the said state shall forever remain public highways, free to the citizens of the said state and of the United States, without any tax, duty, impost or toll therefor imposed by the said state." 3 Stats. at Large, 492.

§ 1432. *The states cannot, without the consent of congress, lay tonnage duties, but they may tax ships as property.*

1. Congress has prescribed the rules of admeasurement and computation for estimating the tonnage of American ships and vessels. 13 id., 70; id., 444. Viewed in the light of those enactments, the word tonnage, as applied to American ships and vessels, must be held to mean their entire internal cubical capacity, or contents of the ship or vessel expressed in tons of one hundred cubical feet each, as estimated and ascertained by those rules of admeasurement and of computation. *Alexander v. Railroad Co.*, 3 Strob., 598. Power to tax, with certain exceptions, resides with the states independent of the federal government, and the power, when confined within its true limits, may be exercised without restraint from any federal authority. They cannot, however, without the consent of congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, as without the consent of congress they are unconditionally prohibited from exercising any such power. Outside of those prohibitions the power of the states to tax extends to all objects within the sovereign power of the states, except the means and instruments of the federal government. But ships and vessels owned by individuals and belonging to the commercial marine are regarded as the private property of their owners, and not as the instruments or means of the federal government, and as such, when viewed as property, they are plainly within the taxing power of the states, as they are not withdrawn from the operation of that power by any express or implied prohibition contained in the federal constitution. *Nathan v. Louisiana*, 8 How., 82 (§§ 1035-37, *supra*); *Howell v. Maryland*, 3 Gill, 14.

Argument, therefore, to show that they may be taxed as other property belonging to the citizens of the state is hardly necessary, as the opposite theory is indefensible in principle, contrary to the generally received opinion, and is wholly unsupported by any judicial determination. Direct adjudication to support that proposition is not to be found in the reported decisions of this court; but there are several cases which concede that such a tax, if levied by a state, would be legal, and no doubt is entertained that the concession is properly made. *Passenger Cases*, 7 How., 402 (§§ 1284-1335, *supra*); *Hays v. Pacific Mail Steamship Co.*, 17 id., 598. Such a concession; however, does not advance the argument much for the defendant, as it is not only equally true

but absolutely certain that no state can, without the consent of congress, lay any duty of tonnage; and the question still remains to be determined whether the taxes in this case were or were not levied as duties of tonnage, as it is clear, if they were, that the judgment of the state court must be reversed.

§ 1433. *Taxes levied on ships as instruments of commerce are within the clause against duties on tonnage.*

Taxes levied by a state upon ships and vessels owned by the citizens of the state *as property, based on a valuation of the same* as property, are not within the prohibition of the constitution; but it is equally clear and undeniable that taxes levied by a state upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the states from levying *any duty of tonnage*, without the consent of congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or the citizens of another state, as the prohibition is general, withdrawing altogether from the states the power to lay any duty of tonnage, under any circumstances, without the consent of congress. *Gibbons v. Ogden*, 9 Wheat., 202 (§§ 1183-1201, *supra*); *Sinnot v. Com'rs of Pilotage of Mobile*, 22 How., 238; *Foster v. Com'rs of Pilotage of Mobile*, id., 245; *Perry v. Torrence*, 8 Ohio, 524. Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question; but if the states, without the consent of congress, tax ships or vessels as instruments of commerce, by a tonnage duty, or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the constitution. *Passenger Cases*, 7 How., 447, 481 (§§ 1284-1335, *supra*).

Prior to the adoption of the constitution the states attempted to regulate commerce, and they also levied duties on imports and exports and duties of tonnage, and it was the embarrassments growing out of such regulations and conflicting obligations which mainly led to the abandonment of the confederation and to the more perfect union under the present constitution.

Congress possesses the power to regulate commerce with foreign nations and among the several states; and it is well settled law that the word commerce, as used in the constitution, comprehends navigation, and that it extends to every species of commercial intercourse between the United States and foreign nations, and to all commerce in the several states, except such as is completely internal and which does not extend to or affect other states. *Gibbons v. Ogden*, 9 Wheat., 193. Authority is also conferred upon congress to lay and collect taxes, but this grant does not supersede the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states, unless it extends to objects prohibited by the constitution, an exercise of any portion of the power that is granted to the United States.

Whether the act of laying and collecting taxes, duties, imposts and excises was a branch of the taxing power or of the power to regulate commerce, was directly under consideration in the case last cited, and it was conclusively settled that the exercise of such a power must be classed with the power to levy taxes. Had the constitution, therefore, contained no prohibition, it is quite clear that it would have been competent for the states to levy duties on imports, exports or tonnage, as they had done under the confederation.

Tonnage duties are as much taxes as duties on imports or exports, and the prohibition of the constitution extends as fully to such duties, if levied by the states, as to duties on imports or exports, and for reasons quite as strong as

those which induced the framers of the constitution to withdraw imports and exports from state taxation. Measures, however, scarcely distinguishable from each other, may flow from distinct grants of power, as, for example, congress does not possess the power to regulate the purely internal commerce of the states, but congress may enroll and license ships and vessels to sail from one port to another in the same state, and it is clear that such ships and vessels are deemed ships and vessels of the United States, and that as such they are entitled to the privileges of ships and vessels employed in the coasting trade. 1 Stat. at Large, 287; id., 305; 3 Kent (11th ed.), 203.

Ships and vessels enrolled and licensed under that act are authorized to carry on the coasting trade, as the act contains a positive enactment that the ships and vessels it describes, and no others, shall be deemed ships or vessels of the United States entitled to the privileges of ships and vessels employed in the trade therein described. *Gibbons v. Ogden*, 9 Wheat., 212 (§§ 1183-1201, *supra*). Evidently the wood license, as used in that act, as the court say in that case, means permission or authority; and it is equally clear that a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, that it transfers to the grantee the right to do whatever it purports to authorize.

Unquestionably the power to regulate commerce includes navigation as well as traffic in its ordinary signification, and embraces ships and vessels as the instruments of intercourse and trade, as well as the officers and seamen employed in their navigation. *Brown v. State of Maryland*, 12 Wheat., 445 (§§ 1466-70, *infra*); *City of New York v. Miln*, 11 Pet., 134 (§§ 1274-83, *supra*); *People v. Brooks*, 4 Denio, 476; *Steamboat Co. v. Livingston*, 3 Cow., 743. Steamboats, as well as sailing ships and vessels, are required to be enrolled and licensed for the coasting trade, and the record shows that all the steamboats taxed in this case had conformed to all the regulations of congress in that regard; that they were duly enrolled and licensed for the coasting trade, and were engaged in the transportation of passengers and freight within the limits of the state, upon waters navigable from the sea by vessels of ten or more tons burden.

Tonnage duties, to a greater or less extent, have been imposed by congress ever since the federal government was organized under the constitution to the present time. They have usually been exacted when the ship or vessel entered the port, and have been collected in a manner not substantially different from that prescribed in the act of the state legislature under consideration. Undisputed authority exists in congress to impose such duties, and it is not pretended that any consent has ever been given by congress to the state to exercise any such power. If the tax levied is a duty of tonnage, it is conceded that it is illegal, and it is difficult to see how the concession could be avoided, as the prohibition is express; but the attempt is made to show that the legislature, in enacting the law imposing the tax, merely referred to the registered tonnage of the steamboats "as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties."

Suppose that could be admitted, it would not have much tendency to strengthen the argument for the defendant, as the suggestion concedes what is obvious from the schedule, that the taxes are levied without any regard to the value of the steamboats. But the proposition involved in the suggestion cannot be admitted, as by the very terms of the act, the tax is levied on the steamboats wholly irrespective of the value of the vessels as property, and solely

and exclusively on the basis of their cubical contents as ascertained by the rules of admeasurement and computation prescribed by the act of congress.

By the terms of the law the taxation prescribed is "at the rate of \$1 per ton of the registered tonnage thereof;" and the ninetieth section of the act provides that the tax collector must, each year, demand of the person in charge of the steamboat whether the taxes have been paid, and if the person in charge fails to produce a receipt therefor by a tax collector, authorized to collect such taxes, the collector having the list must at once proceed to assess the same, and if the tax is not paid on demand he must seize such steamboat, etc., and after twenty days' notice, as therein prescribed, shall sell the same, or so much thereof as will pay the taxes and expenses for keeping and costs. Sess. Acts 1866, pp. 7, 31.

Legislative enactments, where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning. Taxes levied under an enactment which directs that a tax shall be imposed on steamboats at the rate of \$1 per ton of the registered tonnage thereof, and that the same shall be assessed and collected at the port where such steamboats are registered, cannot, in the judgment of this court, be held to be a tax on the steamboat as property. On the contrary the tax is just what the language imports, a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are "plying in the navigable waters of the state," showing to a demonstration that it is as instruments of commerce and not as property that they are required to contribute to the revenues of the state. Such a provision is much more clearly within the prohibition in question than the one involved in a recent case decided by this court, in which it was held that a statute of a state enacting that the wardens of a port were entitled to demand and receive, in addition to other fees, the sum of \$5 for every vessel arriving at the port, whether called on to perform any service or not, was both a regulation of commerce and a duty of tonnage, and that as such it was unconstitutional and void. *Steamship Co. v. Portwardens*, 6 Wall., 34 (§§ 1535-38, *infra*).

Speaking of the same prohibition, the chief justice said in that case that those words in their most obvious and general sense describe a duty proportioned to the tonnage of the vessel — a certain rate on each ton, — which is exactly what is directed by the provision in the tax act before the court; but he added that it seems plain, if the constitution be taken in that restricted sense, it would not fully accomplish the intent of the framers, as the prohibition upon the states against levying duties on imports or exports would be ineffectual if it did not also extend to duties on the ships which serve as the vehicles of conveyance, which was doubtless intended by the prohibition of any duty of tonnage. "It was not only a *pro rata* tax which was prohibited, but *any duty* on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."

Assume the rule to be as there laid down and all must agree that "the levy of the tax in question is expressly prohibited, as the schedule shows that it is exactly proportioned to the registered tonnage of the steamboats plying in the navigable waters of the state." Strong as the language of the chief justice is in that case, it is no stronger than the language employed by the supreme court of the state to which this writ of error was addressed in the case of *Sheffield v. Parsons*, 3 Stew. & P., 304, in which the court in effect says that no tax,

custom, or toll, can be levied "on the tonnage of any vessel, without the consent of congress, for any purpose." Precisely the same rule was applied by that court to vessels duly enrolled and licensed for the coasting trade, and which were exclusively engaged in the towage and lighterage business in the bay and harbor of Mobile, carrying passengers and freight between the city and vessels at the anchorage below the bar. *Lott v. Morgan*, 41 Ala., 250. Some stress was laid in that case upon the circumstance that the vessels taxed were engaged in transporting cargoes to and from vessels engaged in foreign commerce, bound to that port; but it is quite clear that that circumstance is entitled to no weight, as the prohibition extends to *all ships and vessels* entitled to the privileges of ships and vessels employed in the coasting trade, whether employed in commercial intercourse between ports in different states or between different ports in the same state. *People v. Saratoga & Rensselaer R. Co.*, 15 Wend., 131; *Steamboat Co. v. Livingston*, 3 Cow., 743.

Formerly harbor-masters, at the port of Charleston, by an ordinance of that city, might exact one cent per ton, once in every three months, of every steam packet or other vessel from certain adjoining states trading steadily there and performing regular successive voyages to that port; but when the question came to be presented to the court of errors of that state, the judges unanimously held that the exaction was a duty of tonnage, and that, as such, the provision was unconstitutional and void. *Alexander v. Railroad Co.*, 3 Strob., 598.

Taxes in aid of the inspection laws of a state, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation. *Cooley v. Board of Wardens*, 12 How., 314 (§§ 1541-47, *infra*). Laws of that character are upheld as contemplating benefits and advantages to commerce and navigation, and as altogether distinct from imposts and duties on imports and exports and duties of tonnage. Usage, it is said, has sanctioned such laws where congress has not legislated; but it is clear that such laws bear no relation to the act in question, as the act under consideration is emphatically an act to raise revenue to replenish the treasury of the state, and for no other purpose, and does not contemplate any beneficial service for the steamboats or other vessels subjected to taxation. Beyond question the act is an act to raise revenue, without any corresponding or equivalent benefit or advantage to the vessels taxed or to the ship-owners, and consequently it cannot be upheld by virtue of the rules applied in the construction of laws regulating pilot dues and port charges. *State v. Charleston*, 4 Rich. (S. C.), 286; *Benedict v. Vanderbilt*, 1 Robt. (N. Y.), 200.

Attempt was made in the case of *Alexander v. Railroad* to show that the form of levying the tax was simply a mode of assessing the vessels as property, but the argument did not prevail, nor can it in this case, as the amount of the tax is measured by the tonnage of the steamboats and not by their value as property.

Reference is made to the case of *The Towboat Co. v. Bordelon*, 7 La. Ann., 195, as asserting the opposite rule; but the court is of a different opinion, as the tax in that case was levied, not upon the boat but upon the capital of the company owning the boat; and the court in delivering their opinion say the capital of the company is property, and the constitution of the state requires an equal and uniform tax to be imposed upon it with the other property of the state for the support of government.



§ 1434. *A state law levying a tax on vessels at a rate upon their registered tonnage is unconstitutional.*

For these reasons the court is of opinion that the state law levying the taxes in this case is unconstitutional and void; that the judgment of the state court is erroneous, and that it must be reversed; and having come to that conclusion, the court does not find it necessary to determine the other question.

Judgment reversed, with costs, and the cause remanded for further proceedings in conformity to the opinion of the court.

## II. IN THE SECOND CASE.

Much discussion of the questions involved in this record will not be required, as they are substantially the same as those presented in the preceding case, which have already been fully considered and definitely decided. Submitted, as the case was, in the court below on a demurrer to the bill of complaint, and on the answer of the respondent, it will be necessary to refer to the pleadings to ascertain the nature of the controversy, by which it appears that the complainants are a corporation, created by the legislature of the state of Alabama, having their place of business at Mobile, in that state; that they were the owners of twelve steamboats, as alleged in the bill of complaint, filed by them on the 12th of October, 1867, in the chancery court for that county, and that the respondent is the collector of taxes for that county, and a resident of the city of Mobile.

STATEMENT OF FACTS.—Coming to the merits, the complainants allege that the respondent, as such collector, pretends and insists that they are liable under the laws of the state to pay a state tax of \$1 per ton of the registered tonnage of the said several steamboats, without any regard to their value as property; that he also claims that he, as such collector, is authorized by law to collect that amount of the complainants, and also another sum, equal to seventy-five per cent. of the state tax, for the county, and also another sum, equal to twenty-five per cent. of the state tax, as a school tax, making in all a tax of \$2 per ton of the registered tonnage of the said several steamboats, exclusive of the fees of the collector and assessor, amounting to \$1.50 on each of the said steamboats. All of the taxes in controversy in this case were levied by virtue of an act of the legislature approved February 19, 1867, entitled “An act to establish revenue laws for the state,” and it is conceded that the provisions, so far as respects this controversy, are the same as the act under which the taxes were levied in the preceding case. Sess. Acts 1867, p. 645; Revised Code 1867, p. 169, art. 2, § 434, p. 11. Bills of the taxes, it is alleged, were rendered to the complainants, but it is not necessary to enter into these details, except to say that the taxes were levied in the same form as in the preceding case, and the complainants allege that the respondent claims that he is authorized, in case they refuse to pay the taxes, to seize the respective steamboats, and that he may proceed, after twenty days’ notice, to sell the same, or as much thereof as will pay the taxes, expenses and costs. They, the complainants, deny the legality of the taxes, and allege that the respondent, as such collector, threatens to seize the said steamboats and to proceed to sell the same to pay the taxes, expenses and costs, which, they insist, would be contrary to equity. Being without any remedy at law, as they allege, they ask the interposition of a court of equity, and allege that the taxes are illegal upon two grounds, which are as follows:

1. That the tax is a duty of tonnage, levied in violation of the tenth section

of the first article of the constitution, and in support of that allegation they allege that all the steamboats, at the time the taxes were levied, were, and that they still are, duly enrolled and regularly licensed to engage in the coasting trade under and in pursuance of the revenue laws of the United States, and that all the duties imposed upon the steamboats by the laws of the United States have been paid and discharged. 2. That the law of the state levying the taxes is in violation of the act of congress passed to enable the people of Alabama territory to form a constitution and state government, and for the admission of the same into the Union, and of the ordinance passed by the people of the territory accepting that provision. 3 Stat. at Large, 492. Wherefore they pray for process and for an injunction. Process was issued and served, and the respondent appeared and filed an answer, setting up the validity of the taxes, and alleging that the taxes were not intended to be a tonnage duty, but simply and only a tax on the personal property held by the complainants. He also demurred to the bill of complaint, insisting that nothing alleged and charged therein was sufficient to require a further answer. Prior to the filing of the answer the chancellor granted a temporary injunction, and the cause having been subsequently submitted to the court on bill and answer, the chancellor entered a decree making the injunction perpetual, and the respondent appealed to the supreme court of the state, where the injunction was dissolved and the bill of complaint was dismissed. Dissatisfied with that decree the complainants sued out a writ of error and removed the cause into this court.

§ 1435. *Preventive remedies to resist the collection of illegal taxes.*

Different remedies are accorded to a complaining party in different jurisdictions for grievances such as the one set forth in the bill of complaint before the court. Usually preventive remedies are discountenanced as embarrassing to the just operations of the government, and the party taxed is required to pay the tax and seek redress in an action of *assumpsit* against the collector for money had and received. Decided cases may also be referred to where it is held that trespass will lie against the assessor, if it appear that the whole tax was levied without authority, as in that state of the case it is held that the assessor had no jurisdiction of the subject-matter. Preventive remedies, however, are accorded in some of the states; and in cases brought here by writ of error under the twenty-fifth section of the judiciary act, if no objection was taken in the court below to the form of the remedy employed, and none is taken in this court, it may safely be assumed that the proceeding adopted was regarded in the court below as an appropriate remedy for the alleged grievance. Doubts upon that subject cannot be entertained in this case, as the record shows that both courts heard and determined the case upon the merits, and all parties conceded throughout the litigation that the complainants were entitled to the relief prayed in the bill of complaint, if the taxes were illegal, and the law levying the same was unconstitutional and void.

Power to tax for the support of the state governments exists in the states independently of the federal government; and it may well be admitted that where there is no cession of jurisdiction for the purposes specified in the constitution, and no restraining compact between the states and the federal government, the power in the states to tax reaches all the property within the state which is not properly denominated the instruments or means of the federal government. *Nathan v. Louisiana*, 8 How., 82 (§§ 1035-37, *supra*); *McCulloch v. State of Maryland*, 4 Wheat., 429 (§§ 380-398, *supra*); *Society for Savings*

*v. Coite*, 6 Wall., 604; *Brown v. State of Maryland*, 12 Wheat., 448 (§§ 1466-70, *infra*); *Weston v. Charleston*, 2 Pet., 467 (§§ 399-407, *supra*).

§ 1436. *A state tax on ships or vessels at a rate per ton on the registered tonnage is unconstitutional, even if limited to vessels employed exclusively in commerce between ports and places in such state.*

Concede all that, and still the court is of the opinion that the tax in this case is a duty of tonnage, and that the law imposing it is plainly unconstitutional and void. Taxes, as the law provides, must be assessed by the assessor in each county on and from the following subjects and at the following rates, to wit: "On all steamboats, etc., plying in the navigable waters of the state, at the rate of \$1 per ton of the registered tonnage thereof," which must be assessed and collected at the port where such steamboats are registered, etc. Revised Code, 169. Copied as the provision is from the enactment of the previous year, it is obvious that it must receive the same construction; and as the tax is \$1 per ton, it is too plain for argument that the amount of tax depends upon the carrying capacity of the steamboat and not upon her value as property, as the experience of every one shows that a small steamer, new and well built, may be of much greater value than a large one, badly built or in need of extensive repairs. Separate lists are made for the county and school taxes, but the two combined amount exactly to \$1 per ton, as in the levy for the state tax, and the court is of the opinion that the case falls within the same rule as the case just decided.

Evidently the word tonnage in commercial designation means the number of tons burden the ship or vessel will carry, as estimated and ascertained by the official admeasurement and computation prescribed by the public authority. Regulations upon the subject are enacted by parliament in the parent country, and by congress in this country, as appears by several acts of congress. 1 Stat. at Large, 305; 13 id., 444. Tonnage, says a writer of experience, has long been an official term intended originally to express the burden that a ship would carry, in order that the various dues and customs which are levied upon shipping might be levied according to the size of the vessel, or rather in proportion to her capability of carrying burden. Hence the term, as applied to a ship, has become almost synonymous with that of size. Homan's Com. and Nav., Tonnage. Apply that interpretation to the word tonnage as used in the tax act under consideration, and it is as clear as anything can be in legislation that the tax imposed by that provision is a tonnage tax, or duty of tonnage, as the phrase is in the constitution.

State authority to tax ships and vessels, it is supposed by the respondent, extends to all cases where the ship or vessel is not employed in foreign commerce or in commerce between ports or places in different states. He concedes that the states cannot levy a duty of tonnage on ships or vessels if the ship or vessel is employed in foreign commerce or in commerce "among the states," but he denies that the prohibition extends to ships or vessels employed in commerce between ports and places in the same state, and that is the leading error in the opinion of the supreme court of the state. Founded upon that mistake the proposition is that all taxes are taxes on property, although levied on ships and vessels duly enrolled and licensed, if the ship or vessel is not employed in foreign commerce or in commerce among the states.

Ships or vessels of ten or more tons burden, duly enrolled and licensed, if engaged in commerce on waters which are navigable by such vessels from the sea, are ships and vessels of the United States entitled to the privileges secured

to such vessels by the act for enrolling or licensing ships or vessels to be employed in the coasting trade. 1 Stat. at Large, 205; *id.*, 287.

Such a rule as that assumed by the respondent would incorporate into the constitution an exception which it does not contain. Had the prohibition in terms applied only to ships and vessels employed in foreign commerce or in commerce among the states, his construction would be right; but courts of justice cannot add any new provision to the fundamental law, and, if not, it seems clear to a demonstration that the construction assumed by the respondent is erroneous.

Decree reversed and the cause remanded for further proceedings in conformity to the opinion of this court.

§ 1437. Charges for use of wharves.—A state statute regulating charges for the use of a wharf is constitutional. It is not repugnant to the commercial clause of the constitution, nor to the provision against duties on tonnage. *The Canal-boat Ann Ryan*,\* 7 Ben., 20; *The John M. Welch*,\* 9 Ben., 507. See §§ 1378, 1404.

§ 1438. An exception in such statute in favor of canal navigation of the state, but not discriminating between persons engaged in such navigation, is not subject to the objection of being an unjust discrimination in favor of citizens of the state. *Ibid.*

§ 1439. The laws of New York of May 6, 1870 (ch. 707, § 1), as amended by the laws of May 21, 1875 (ch. 405), so far as they make a discrimination in the rates of wharfage in the cities of New York and Brooklyn, between canal-boats navigating canals of the state, and those coming from other waters, in favor of the former, are invalid, as being a violation of the constitution of the United States in imposing a burden upon interstate commerce. (*Overruling The Barge John M. Welch*, 9 Ben., 507.) *The John M. Welch*, 18 Blatch., 68.

§ 1440. A municipal corporation owning improved wharves and other artificial means, which it maintains at its own cost for the benefit of those engaged in commerce upon the navigable waters of the United States, may charge and collect from parties using its wharves such reasonable fees as will fairly remunerate it for the use of its property. The charges may be proportioned to the tonnage of the vessels using the wharf. *Leathers v. Aiken*,\* 9 Fed. R., 679; *Packet Co. v. St. Louis*,\* 10 Otto, 423.

§ 1441. The purposes for which the city expends the money collected does not affect the legality of the law. The objection, therefore, that the money was used to support a harbor police, pay wharfingers, etc., and maintain an electric light system on the wharves, was held untenable, though the complainant contended that he did not load or unload at the wharves at night, and therefore did not need the electric light. *Ibid.*

§ 1442. The ordinances of a city prescribing wharfage dues at the improved wharves constructed by it, the amount being graduated according to the size of the vessel, to be ascertained by its tonnage, and making no charge for landing at the unimproved landing, does not "lay any duty of tonnage" within the meaning of the federal constitution. *North-Western Union Packet Co. v. St. Louis*,\* 4 Dill., 10; *North-Western Union Packet Co. v. City of Hannibal*,\* 4 Dill., 18.

§ 1443. Where the ordinance of a city, fixing wharfage dues, covered the entire corporate limits of the city, as well the unimproved as the improved landing, it was held that vessels that chose to use the improved wharf must pay the dues, and could not claim the ordinance to be unconstitutional as laying a duty on tonnage. *North-Western Union Packet Co. v. City of Louisiana*,\* 4 Dill., 17; *North-Western Union Packet Co. v. City of Clarks-ville*,\* 4 Dill., 18.

§ 1444. The ordinance of the city of St. Paul, which fixes the rates per ton on all vessels which may land or anchor at or in front of any landing within the city limits, provided that no boat shall pay more than \$20 for each trip; fixing the tax upon the vessel, whether at the landing or anchored in the middle of the stream in front of a landing, is a charge, not for the use of the wharf, but for the privilege of arriving at and departing from the port, and is void as conflicting with the federal constitution. If such a tax is paid under protest, or with notice of intention to test its validity, it may be recovered back. *North-Western Packet Co. v. St. Paul*,\* 3 Dill., 454.

§ 1445. Quarantine laws.—States have the power to pass quarantine laws, though they do affect commerce by producing delay and inconvenience. But a state cannot, for the purpose of raising revenue for the enforcement of such laws, impose a tax upon the tonnage of vessels owned by citizens of other states and engaged in commerce between the states. *Peete v. Morgan*,\* 19 Wall., 581.

7. *Duties on Imports and Exports.*

SUMMARY — *Constitutional provisions*, § 1446. — *Logs awaiting shipment are exports*, § 1447. — *Stamp tax on bills of lading*, § 1448. — *Importer's license*, §§ 1449-1451. — *What is an impost on imports*, §§ 1450, 1452. — *Tax on imported goods sold in the original packages*, §§ 1452, 1453. — *Tax on sales by auctioneers*, § 1454. — *Discrimination against imported goods*, § 1455. — *License for retail of imported liquors*, § 1456. — *Concurrent powers of state and federal governments*, § 1457. — *Inspection laws*, §§ 1458-1463.

§ 1446. "No tax or duty shall be laid on articles exported from any state." Const., art. I, sec. 9. "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress." Art. I, sec. 10.

§ 1447. Logs in port awaiting shipment are exports, and cannot be taxed by a state. *Clarke v. Clarke*, § 1464.

§ 1448. A stamp tax imposed by a state on bills of lading for the transportation from any point or place in the state to any point or place without the state of gold or silver coin, in whole or in part, gold-dust, or gold or silver in bar or other form, is a duty on exports, and unconstitutional. *Almy v. State of California*, § 1465.

§ 1449. A state law requiring importers of foreign goods to take out and pay for a license from the state before selling in their original packages goods imported into the United States is repugnant to the commercial clause of the constitution, and to the provision prohibiting the states from laying duties on imports. *Brown v. State of Maryland*, §§ 1466-70.

§ 1450. An impost or duty on imports is a custom or tax levied on articles brought into a country, and is usually secured before the importer is allowed to exercise his rights of ownership over them. It would not, however, be less an impost or duty on the articles if it were to be levied on them after they were landed. *Ibid.*

§ 1451. A distinction is made between goods which have been acted upon by the importer so as to become incorporated with the mass of property in the country, and those which remain in the hands of the importer in the original packages. *Ibid.*

§ 1452. The word "imports," as used in that clause of the constitution prohibiting the states from levying any imposts or duties on imports, has reference only to imports from foreign countries. A state may, therefore, tax sales of goods which are the product of other states, and sold in the original packages. *Woodruff v. Parham*, §§ 1471-73. See § 1526.

§ 1453. Sales of goods by an importer are exempt from state taxation; but one who contracts for the purchase of foreign goods, shipped at the risk of the shipper or consignee, is not an importer, and the goods may be taxed in his hands in the original packages. *Waring v. The Mayor*, §§ 1474-77.

§ 1454. A state law requiring auctioneers to pay into the state treasury a tax of a certain per cent. on all sales of goods by them is, when applied to imported goods sold for the importer in the original packages, repugnant to that provision of the constitution which forbids the states to lay any duty on imports. *Cook v. Pennsylvania*, §§ 1479-80.

§ 1455. A state tax law, discriminating against imported goods, is an unconstitutional regulation of commerce. *Ibid.*

§ 1456. A state may prohibit the sale at retail, without a license, of liquors imported from another state of the Union or from foreign countries. *License Cases*, §§ 1481-1518. See § 1531.

§ 1457. Concurrent powers of the state and federal governments in the regulation of commerce. *Ibid.*

§ 1458. A law of Texas permitted the shipment from the state of hides imported from Mexico on the shipper's obtaining from an inspector a certificate as to the date of importation, name of importer, brand, etc., and paying therefor an inspection fee. *Held*, that the law was valid as an inspection law. *Neilson v. Garza*, §§ 1519-22.

§ 1459. The right to make inspection laws is not granted to congress, but is reserved to the states; but it is subject to the paramount right of congress to regulate commerce with foreign nations and among the several states; and if any state, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws. *Ibid.*

§ 1460. Congress is the proper authority to decide whether a charge or duty is or is not

excessive; and if the law in question is in fact an inspection law, it must stand until congress sees fit to alter it. *Ibid.*

§ 1461. The scope of inspection laws is very large, and applies to articles imported and those intended for exportation. *Ibid.*

§ 1462. A state law requiring the master, owner, agent or consignee of every vessel to pay a duty of \$1 on every alien passenger brought from a foreign port, the money so collected to be expended as far as necessary by the commissioners of emigration in the execution of the inspection laws of the state, the surplus to be paid into the treasury of the United States, is void as a regulation of commerce. *People v. Compaigne Generale Transatlantique*, §§ 1523-25.

§ 1463. The provision of the constitution under which the states may levy duties for the purpose of executing inspection laws has reference to merchandise and not to persons. *Ibid.*

[NOTES.— See §§ 1526-1581.]

#### CLARKE v. CLARKE.

(Circuit Court for Georgia: 8 Woods, 408-412. 1877.)

STATEMENT OF FACTS.—The defendant in this suit, being receiver of tax returns, caused plaintiffs' logs to be sold for non-payment of taxes. Plaintiffs' declaration set forth that the logs were exports, and were not liable to a tax.

Opinion by Woods, J.

The plaintiffs claim that the logs of timber mentioned in the declaration on which the said tax was levied were exports, and therefore exempt from state taxation, under section 10, article 1, of the constitution of the United States, which declares: "No state shall, without the consent of the congress, levy any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

Section 799 of the code of Georgia declares that "all real and personal estate, whether owned by individuals or corporations, resident or non-resident, are liable to taxation unless specially exempted," and section 798 of the same code exempts from taxation "all property specially exempted by the constitution of the United States." The defendants claim, first, that the timber logs of the plaintiffs on which the tax was levied were not "exports" in the sense in which that word is used in the constitution of the United States; and second, that the tax levied was neither an "impost" nor a "duty," and therefore the said tax was not prohibited by the constitution of the United States. The logs on which the tax was levied were the property of and were in possession of persons engaged exclusively in exporting timber to foreign countries, they were purchased from citizens of Georgia for the purpose of exportation, they were in a port of the United States awaiting shipment, they had been inspected according to the laws of the state, and the purpose of the owners to export the logs was, after the levy of the tax thereon, actually carried out, and the logs were exported.

§ 1464. *Articles of merchandise in a port awaiting shipment, after having been duly inspected, are "exports," and therefore cannot be taxed by state authority.*

It is clear, and it seems to be conceded by defendants, that if the logs had actually been on shipboard when the tax was levied, they might have well been considered exports. Is the fact that they were still on land, though awaiting shipment, such a circumstance as deprives them of their character as exports? The reasoning of the court in the case of *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *infra*), demonstrates that it is not. The court, in construing section 10, article 1, of the constitution, says: "The limitation is, 'except what may be absolutely necessary for executing the inspec-

tion laws.' Now, the inspection laws, so far as they act on articles for exportation, are generally executed on land before the article is put on board the vessel; so far as they act on importations, they are generally executed on articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for services performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition." Mr. Madison, in defending the clause under consideration, in the convention of Virginia called to adopt the constitution, said: "Some states export the produce of other states; Virginia exports the produce of North Carolina; Pennsylvania those of New Jersey and Delaware, and Rhode Island those of Connecticut and Massachusetts. The states exporting wished to retain the power of laying duties on exports to enable them to pay expenses incurred. The states whose produce was exported by other states were extremely jealous, lest a contribution should be raised of them by the exporting states by laying heavy duties on their own commodities. If this clause be fully considered, it will be found to be more consistent with justice and equity than any other practicable mode."

These views show that, in the opinion of Mr. Madison, the commodities of the producing states were considered exports even before they reached the port of shipment. It seems clear, then, from these authorities, that these logs were, when the tax was laid upon them, even though they were still on land, exports within the meaning of the constitution of the United States, and as such protected from imposts or duties by the state. But the defendants claim that the tax upon the logs was a tax levied upon the general mass of property in the state, and does not therefore fall within the constitutional prohibition, being neither an "impost" nor a "duty." This construction would defeat the purpose for which section 10, article 1, was adopted. It would put it in the power of the state, by changing the manner of levying the tax, and by giving it another name, to evade the prohibition of the constitution.

In the case of *Low v. Austin*, 13 Wall., 29, the supreme court of the United States, having the subject under consideration, said: "The supreme court of California appears from its opinion to have considered the present case as excepted from the rule laid down in *Brown v. Maryland*, because the tax levied is not directly upon imports as such, and consequently the goods imported are not subjected to any burden as a class, but are only included as a part of the whole property of its citizens, which is subjected equally to an *ad valorem* tax. But the obvious answer to this position is found in the fact which is in substance expressed in the citations, made from the opinions of Marshall and Taney, that the goods imported do not lose their character as imports and become incorporated into the mass of the property of the state until they have passed from the control of the importer or been broken up by him from their original cases. While retaining their character as imports a tax upon them in any shape is within the constitutional prohibition. The extent and character of the tax are mere matters of legislative discretion." This authority is directly opposed to the claim of defendants under consideration.

These views dispose of the main questions in this case. In the case of *Brown v. Maryland*, 12 Wheat., *supra*, Mr. Chief Justice Marshall remarks: "The constitutional prohibition to levy a duty on imports may certainly come in conflict with their acknowledged power to tax persons and property within their

territories. The power and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between black and white, approach so nearly as to perplex the understanding, as colors perplex the vision in making a distinction between them; yet the distinction exists and must be marked as the cases arise. Till they do arise it might be premature to state every rule as being universal in its application." Profiting by this caution, all I undertake to decide in this case is, that, under the circumstances set out in the declaration, the logs of the plaintiff were exports and exempted from state taxation by the constitution of the United States. As they are exempted by the federal constitution they were exempted from state taxation by express provision of the code of Georgia. Code, sec. 798, par. 1; Act of 1875, sec. 9, p. 117.

The defendants, in enforcing the tax levied on plaintiffs' property, were acting without authority of law. The assessor and collector were clearly without jurisdiction to assess and collect the tax, and the execution issued to the sheriff is no protection to him. They are all trespassers alike, and this action is well brought against them. *Wise v. Withers*, 3 Cranch, 331. Demurrer overruled.

#### ALMY v. STATE OF CALIFORNIA.

(24 Howard, 169-174. 1860.)

ERROR to the Court of Sessions of the City and County of San Francisco.  
Opinion by TANEY, C. J.

STATEMENT OF FACTS.—The only question in this case is upon the constitutionality of a law of California imposing a stamp tax upon bills of lading.

By an act passed by the legislature of that state to provide a revenue for the support of the government from a stamp tax on certain instruments of writing, among other instruments mentioned in the law a stamp tax was imposed on bills of lading for the transportation from any point or place in that state to any point or place without the state of gold or silver coin, in whole or in part, gold-dust, or gold or silver in bars or other form; and the law requires that there shall be attached to the bill of lading, or stamped thereon, a stamp or stamps expressing in value the amount of such tax or duty. By a previous law upon the same subject it was made a misdemeanor, punishable by fine, to use any paper without a stamp, where the law required stamped paper to be used. After the passage of these acts, Almy, the plaintiff in error, being the master of the ship *Ratler*, then lying in the port of San Francisco and bound to New York, received a quantity of gold-dust for transportation to New York, for which he signed a bill of lading upon unstamped paper, and without having any stamp attached to it. For this disobedience to the law of California he was indicted in the court of sessions for a misdemeanor, and at the trial the jury found a special verdict setting out particularly the facts, of which the above is a brief summary; and upon the return of the verdict the counsel for the defendant moved for a judgment of acquittal, upon the ground that the law of California was repugnant to the constitution of the United States. But the court decided that the state law was not repugnant to the constitution of the United States, and adjudged that Almy should pay a fine of \$100 for this offense. And the court of sessions being the highest court of the state which had jurisdiction of the matter in controversy, this writ of error is brought to revise that judgment.



§ 1465. *A tax by a state on bills of lading of any special commodity is in effect a duty on exports, and contrary to the constitution of the United States.*

We think this case cannot be distinguished from that of *Brown v. State of Maryland*, reported in 12 Wheat., 419 (§§ 1466-70, *infra*). That case was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the constitution now in question. The case was this: The state of Maryland, in order to raise a revenue for state purposes, among other things required all importers of certain foreign articles and commodities enumerated in the law, or other persons selling the same by wholesale, before they were authorized to sell, to take out a license, for which they should pay \$50; and in case of refusal or neglect, should forfeit the amount of the license tax and pay a fine of \$100, to be recovered by indictment. Brown, who was an importing merchant, residing in Baltimore, refused to pay the tax, and was thereupon indicted in the state court, which sustained the validity of the state law, and imposed the penalty therein prescribed. This judgment was removed to this court by writ of error, and it will be seen by the report of the case that it was elaborately argued on both sides, and the opinion of the court, delivered by Chief Justice Marshall, shows that it was carefully and fully considered by the court. And the court decided that this state law was a tax on imports, and that the mode of imposing it, by giving it the form of a tax on the occupation of importer, merely varied the form in which the tax was imposed, without varying the substance. So in the case before us. If the tax was laid on the gold or silver exported, every one would see that it was repugnant to the constitution of the United States, which, in express terms, declares that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a ship-master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported. And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the state, provided the tax is imposed in the form of a tax on the bill of lading, and this in direct opposition to the plain and express prohibition in the constitution of the United States.

In the case now before the court, the intention to tax the export of gold and silver, in the form of a tax on the bill of lading, is too plain to be mistaken. The duty is imposed only upon bills of lading of gold and silver, and not upon articles of any other description. And we think it is impossible to

assign a reason for imposing the duty upon the one and not upon the other, unless it was intended to lay a tax on the gold and silver exported, while all other articles were exempted from the charge. If it was intended merely as a stamp duty on a particular description of paper, the bill of lading of any other cargo is in the same form, and executed in the same manner and for the same purposes, as one for gold and silver, and so far as the instrument of writing was concerned, there could hardly be a reason for taxing one and not the other.

In the judgment of this court, the state tax in question is a duty upon the export of gold and silver, and consequently repugnant to the clause in the constitution hereinbefore referred to; and the judgment of the court of sessions must therefore be reversed.

BROWN v. STATE OF MARYLAND.

(12 Wheaton, 419-459. 1827.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is a writ of error to a judgment rendered in the court of appeals of Maryland, affirming a judgment of the city court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the second section of that act, which is in these words: "And be it enacted that all importers of foreign articles or commodities, of dry goods, wares or merchandise, by bale or package, or of wine, rum, brandy, whiskey and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay \$50; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them, on demurrer, for the penalty which the act prescribes for the offense; and that judgment is now before this court. The cause depends entirely on the question whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported.

§ 1466. *The presumption is in favor of every legislative act, and the whole burden lies on him who denies its constitutionality.*

It has been truly said that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality. The plaintiffs in error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the constitution of the United States. 1. To that which declares that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." 2. To that which declares that congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon states "to lay any imposts or duties on imports or exports." The counsel for the state of

Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope. In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the Union, and of the respective states, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

§ 1467. "*Duty on imports*" defined.

What, then, is the meaning of the words, "imposts or duties on imports or exports?" An impost or duty on imports is a custom or tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports?" The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence, which limit the prohibition, show the extent in which it was understood. The limitation is, "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words proves that, in the opinion of the law-giver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws goes far in proving that the framers of the constitution classed taxes of a similar character with those imposed for the purpose of inspection, with duties on imports and exports, and supposed them to be prohibited. If we quit this narrow view of the object, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different states of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest or excited more irritation than the manner in which the several states exercised, or

seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the states were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of congress. Whether the prohibition to "lay imposts or duties on imports or exports" proceeded from an apprehension that the power might be so exercised as to disturb that equality among the states which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a state, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular state. We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety. The states will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any state would act so unwisely. But we do not place the question on that ground. These arguments apply with precisely the same force against the whole prohibition. It might with the same reason be said that no state would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our constitution have thought this a power which no state ought to exercise. Conceding, to the full extent which is required, that every state would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded that each would respect the interests of others. A duty on imports is a tax on the article, which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those states whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was,

with a single and slight exception, taken from the states. When we are inquiring whether a particular act is within this prohibition, the question is not whether the state may so legislate as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already been shown that a tax on the article in the hands of the importer is within its words; and we think it too clear for controversy that the same tax is within its mischief. We think it unquestionable that such a tax has precisely the same tendency to enhance the price of the article as if imposed upon it while entering the port.

The counsel for the state of Maryland insist, with great reason, that, if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the states, to an extent which has never been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist that entering the country is the point of time when the prohibition ceases, and the power of the state to tax commences.

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the state to tax commences,—we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious that this construction would defeat the prohibition.

§ 1468. *A tax on an article imported, while in the hands of the person who imported it, is a duty on imports. (a)*

The constitutional prohibition on the states to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was

(a) Imported merchandise, upon which the duties and charges at the custom-house have been paid, is not subject to state taxation, while remaining in the original packages, unbroken and unsold, in the hands of the original importer. Goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, until they have passed from the control of the importer, or been broken up by him from their original cases. While retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the state to levy any tax. *Low v. Austin*, 13 Wall., 20.

imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

§ 1469. *The payment of duties on imports to the United States implies a right to sell the goods imported.*

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried overland for the purpose of being re-exported from some other port, goods forced in by stress of weather and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where and as he pleases, and the state cannot regulate it. He may sell by retail, at auction, or as an itinerant peddler. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied. An importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation. These objections to the principle, if well founded, would certainly be entitled to serious consideration. But we think they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition.

This indictment is against the importer for selling a package of dry goods in the form in which it was imported without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and traveling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States until he shall have also purchased it from the state. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer. So if he sells by auction. Auctioneers are persons licensed by the state, and if

the importer chooses to employ them, he can as little object to paying for this service as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the state to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is undoubtedly an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the states, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the constitution no further than to prevent the states from doing that which it was the great object of the constitution to prevent. But if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution.

In support of the argument that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words, export and import. As to export, it is said, means only to carry goods out of the country, so to import, means only to bring them into it. But suppose we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the states. Now suppose the United States should require every exporter to take out a license, for which he should pay such tax as congress might think proper to

impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

§ 1470. *A law requiring importers of foreign goods to pay for and take out a license from the state, before selling in their original packages goods imported into the United States, is unconstitutional and void. It is repugnant to the commerce clause.*

We think, then, that the act under which the plaintiffs in error were indicted is repugnant to that article of the constitution which declares that “no state shall lay any impost or duties on imports or exports.”

2. Is it also repugnant to that clause in the constitution which empowers “congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes?” The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states? This question was considered in the case of *Gibbons v. Ogden*, 9 Wheat., 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior. We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned. If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is



traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize the sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. If this be admitted, and we think it cannot be denied, what can be the meaning of an act of congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the states is a sufficient security against it. The constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not how far will it be probably abused? The power claimed by the state is, in its nature, in conflict with that given to congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence. We think, then, that if the power to authorize a sale exists in congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article in his character of importer must be in opposition to the act of congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation. The distinction between a tax on the thing imported and on the person of the importer can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory. We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers

remaining with the states may be so exercised as to come in conflict with those vested in congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results necessarily, from this principle, that the taxing power of the states must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it, from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another state for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up and considered with great attention in *M'Culloch v. State of Maryland*, 4 Wheat., 316 (§§ 380-398, *supra*), the decision in which case is, we think, entirely applicable to this. It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the court of appeals of the state of Maryland, in affirming the judgment of the Baltimore city court, because the act of the legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the constitution of the United States, and, consequently, void. The judgment is to be reversed, and the cause remanded to that court, with instructions to enter judgment in favor of the appellants.

MR. JUSTICE THOMPSON dissenting: 1. That the law was not a regulation of interstate commerce. 2. That it was not a regulation of foreign commerce; that all external commerce ends with the importation of the foreign article; that the importation is complete as soon as the goods are introduced into the country, according to the provisions of the revenue laws, with the intention of being sold here for consumption, or for the purpose of internal or domestic trade, and the duties paid or secured. (9 Wheat., 194; 5 Cranch, 368; 9 Cranch, 104; 1 Mason, 499, cited.) 3. That the compensation required by the law to be paid for a license to sell cannot be considered an impost or duty, within the meaning of the constitution; that those terms refer to a foreign duty, and not to any charge that may grow out of the internal police of the states; that the distinction attempted to be maintained between the importer, or wholesale dealer, and the retail dealer is untenable; that the charge is upon the wholesale dealer, whoever he may be, and operates upon the sale, and not upon the importation.

## WOODRUFF v. PARHAM.

(8 Wallace, 123-147. 1868.)

ERROR to the Supreme Court of Alabama.

STATEMENT OF FACTS.—In this case Woodruff refused to pay a tax levied by the city of Mobile, on the ground that the goods taxed were the product of other states and were sold in the original packages, and the tax was therefore unconstitutional.

Opinion by MR. JUSTICE MILLER.

The case was heard in the courts of the state of Alabama upon an agreed statement of facts, and that statement fully raises the question whether merchandise brought from other states and sold, under the circumstances stated, comes within the prohibition of the federal constitution, that no state shall, without the consent of congress, levy any imposts or duties on imports or exports. And it is claimed that it also brings the case within the principles laid down by this court in *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *supra*). That decision has been recognized for over forty years as governing the action of this court in the same class of cases, and its reasoning has been often cited and received with approbation in others to which it was applicable. We do not now propose to question its authority or to depart from its principles. The tax of the state of Maryland, which was the subject of controversy in that case, was limited by its terms to importers of foreign articles or commodities, and the proposition that we are now to consider is whether the provision of the constitution to which we have referred extends, in its true meaning and intent, to articles brought from one state of the Union into another.

The subject of the relative rights and powers of the federal and state governments in regard to taxation, always delicate, has acquired an importance by reason of the increased public burdens growing out of the recent war, which demands of all who may be called in the discharge of public duty to decide upon any of its various phases, that it shall be done with great care and deliberation. Happily for us, much the larger share of these responsibilities rests with the legislative departments of the state and federal governments. But when, under the pressure of a taxation necessarily heavy, and in many cases new in its character, the parties affected by it resort to the courts to ascertain whether their individual rights have been infringed by legislation, and assert rights supposed to be guarantied by the federal constitution, they, in every such case properly brought before us, devolve upon this court an obligation to decide the question raised from which there is no escape.

§ 1471. *Imports means articles brought into the country; impost means duty or tax paid on such articles.*

The words impost, imports and exports are frequently used in the constitution. They have a necessary correlation, and when we have a clear idea of what either word means in any particular connection in which it may be found, we have one of the most satisfactory tests of its definition in other parts of the same instrument. In the case of *Brown v. Maryland*, the word imports, as used in the clause now under consideration, is defined, both on the authority of the lexicons and of usage, to be articles brought into the country; and impost is there said to be a duty, custom or tax levied on articles brought into the country. In the ordinary use of these terms at this day, no one would, for a moment, think of them as having relation to any other articles than those

brought from a country foreign to the United States, and at the time the case of *Brown v. Maryland* was decided — namely, in 1827 — it is reasonable to suppose that the general usage was the same, and that in defining imports as articles brought into the country, the chief justice used the word country as a synonym for United States. But the word is susceptible of being applied to articles introduced from one state into another, and we must inquire if it was so used by the framers of the constitution.

§ 1472. *The word "imposts," as used in the constitution, means tax or duty levied on goods brought into the United States from foreign countries. (a)*

Leaving, then, for a moment, the clause of the constitution under consideration, we find the first use of any of these correlative terms in that clause of the eighth section of the first article which begins the enumeration of the powers confided to congress. "The congress shall have power to levy and collect taxes, duties, imposts and excises, . . . but all duties, imposts and excises shall be uniform throughout the United States."

Is the word impost, here used, intended to confer upon congress a distinct power to levy a tax upon all goods or merchandise carried from one state into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any state, for no article can be imported from one state into another which is not, at the same time, exported from the former. But if we give to the word imposts, as used in the first-mentioned clause, the definition of Chief Justice Marshall, and to the word export the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts.

It is also to be remembered that the convention was here giving the right to lay taxes by national authority in connection with paying the debts and providing for the common defense and the general welfare, and it is a reasonable inference that they had in view, in the use of the word imports, those articles which, being introduced from other nations and diffused generally over the country for consumption, would contribute, in a common and general way, to the support of the national government. If internal taxation should become necessary, it was provided for by the terms taxes and excises.

There are two provisions of the clause under which exemption from state taxation is claimed in this case, which are not without influence on that prohibition, namely: that any state may, with the assent of congress, lay a tax on imports, and that the net produce of such tax shall be for the benefit of the treasury of the United States. The framers of the constitution, claiming for the general government, as they did, all the duties *on foreign* goods imported into the country, might well permit a state that wished to tax more heavily than congress did, foreign liquors, tobacco or other articles injurious to the community, or which interfered with their domestic policy, to do so, provided such tax met the approbation of congress, and was paid into the federal treasury. But that it was intended to permit such a tax to be imposed by such authority on the products of neighboring states for the use of the federal government, and that congress, under this temptation, was to arbitrate between the state which proposed to levy the tax and those which opposed it, seems altogether

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(a) To the same effect, *Hinson v. Lott*, 8 Wall., 148.

improbable. Yet this must be the construction of the clause in question if it has any reference to goods imported from one state into another.

If we turn for a moment from the consideration of the language of the constitution to the history of its formation and adoption, we shall find additional reason to conclude that the words imports and imposts were used with exclusive reference to articles imported from foreign countries. Section 3, article 6, of the confederation provided that no state should lay imposts or duties which might interfere with any stipulation in treaties entered into by the United States; and section 1, article 9, that no treaty of commerce should be made whereby the legislative power of the respective states should be restrained from imposing such imposts and duties on foreigners as their own people were subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever. In these two articles of the confederation, the words imports, exports and imposts are used with exclusive reference to foreign trade, because they have regard only to the treaty-making power of the federation.

As soon as peace was restored by the success of the Revolution, and commerce began to revive, it became obvious that the most eligible mode of raising revenue for the support of the general government and the payment of its debts was by duties on foreign merchandise imported into the country. The congress accordingly recommended the states to levy a duty of five per cent. on all such imports, for the use of the confederation. To this, Rhode Island, which, at that time, was one of the largest importing states, objected, and we have a full report of the remonstrance addressed by a committee of congress to that state on that subject. 1 Elliot's Debates, 131-3. And the discussions of the congress of that day, as imperfectly as they have been preserved, are full of the subject of the injustice done by the states who had good sea-ports, by duties levied in those ports on foreign goods designed for states who had no such ports.

In this state of public feeling in this matter, the constitutional convention assembled. Its very first grant of power to the new government about to be established was to lay and collect imposts or duties on foreign goods imported into the country, and among its restraints upon the states was the corresponding one that *they* should lay no duties on imports or exports. It seems, however, from Mr. Madison's account of the debates, that while the necessity of vesting in congress the power to levy duties on foreign goods was generally conceded, the right of the states to do so, likewise was not given up without discussion, and was finally yielded with the qualification to which we have already referred, that the states might lay such duties with the assent of congress. Mr. Madison moved that the words, "nor lay imposts or duties on imports," be placed in that class of prohibitions which were absolute, instead of those which were dependent on the consent of congress. His reason was that the states interested in this power (meaning those who had good sea-ports), by which they could tax the imports of their neighbors passing through their markets, were a majority, and could gain the consent of congress, to the injury of New Jersey, North Carolina, and other non-importing states. But his motion failed. 5 Madison Papers, 486. In the convention of Virginia, called to adopt the constitution, that distinguished expounder and defender of the instrument, so largely the work of his own hand, argued, in support of the authority to lay direct taxes, that, without this power, a disproportion of burden would be imposed on the southern states, because, having fewer manu-

factures, they would consume more imports and pay more of the imposts. 3 Elliot's Debates, 248. So in defending the clause of the constitution now under our consideration, he says: "Some states export the produce of other states. Virginia exports the produce of North Carolina; Pennsylvania those of New Jersey and Delaware; and Rhode Island those of Connecticut and Massachusetts. The exporting states wished to retain the power of laying duties on exports to enable them to pay expenses incurred. The states whose produce was exported by other states were extremely jealous lest a contribution should be raised of them by the exporting states, by laying heavy duties on their own commodities. If this clause be fully considered it will be found to be more consistent with justice and equity than any other practicable mode; for, if the states had the exclusive imposition of duties on exports, they might raise a heavy contribution of the other states for their own exclusive emoluments." 2 id., 443-4. Similar observations, from the same source, are found in the forty-second number of the Federalist, but with more direct reference to the power to regulate commerce.

Governor Ellsworth, in opening the debate of the Connecticut convention on the adoption of the constitution, says: "Our being tributary to our sister states is in consequence of the want of a federal system. The state of New York raises £60,000 or £80,000 in a year by impost. Connecticut consumes about one-third of the goods upon which this impost is laid, and consequently pays one-third of this sum to New York. If we import by the medium of Massachusetts, she has an impost, and to her we pay tribute." 2 Elliot's Debates, 192. A few days later, he says: "I find, on calculation, that a general impost of five per cent. would raise a sum of £245,000," and adds: "It is a strong argument in favor of an impost, that the collection of it will interfere less with the internal police of the states than any other species of taxation. It does not fill the country with revenue officers, but is confined to the sea-coast, and is chiefly a water operation. . . . If we do not give it to congress, the individual states will have it." 2 id., 196.

It is not too much to say that, so far as our research has extended, neither the word export, import or impost is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. The only allusion to imposts in the articles of confederation is clearly limited to duties on goods imported from foreign states. Wherever we find the grievance to be remedied by this provision of the constitution alluded to, the duty levied by the states on foreign importations is alone mentioned, and the advantages to accrue to congress from the power confided to it, and withheld from the states, is always mentioned with exclusive reference to foreign trade.

Whether we look, then, to the terms of the clause of the constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by *this clause*, the right of one state to tax articles brought into it from another. If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the constitution as thus construed. The merchant of Chicago who buys his goods in New York, and sells at wholesale in the original packages, may have his millions employed in trade for half a life-time and escape all state, county and city

taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the state nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens.

These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one state into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown v. Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible. It is said, however, that, as a court, we are bound, by our former decisions, to a contrary doctrine, and we are referred to the cases of *Almy v. State of California* (24 How., 169; § 1465, *supra*) and *Brown v. Maryland* in support of the assertion. The case first mentioned arose under a statute of California, which imposed a stamp tax on bills of lading for the transportation of gold and silver from any point within the state to any point without the state.

The master of the ship *Rattler* was fined for violating this law, by refusing to affix a stamp to a bill of lading for gold shipped on board his vessel from San Francisco to New York. It seems to have escaped the attention of counsel on both sides, and of the chief justice who delivered the opinion, that the case was one of interstate commerce. No distinction of the kind is taken by counsel, none alluded to by the court, except in the incidental statement of the *termini* of the voyage. In the language of the court, citing *Brown v. Maryland* as governing the case, the statute of Maryland is described as a tax on foreign articles and commodities. The only question *discussed* by the court is, whether the bill of lading was so intimately connected with the articles of export described in it that a tax on it was a tax on the articles exported. And, in arguing this proposition, the chief justice says that "a bill of lading, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a *foreign country*, and consequently a duty upon that is, in substance and effect, a duty on the article exported." It is impossible to examine the opinion without perceiving that the mind of the writer was exclusively directed to foreign commerce, and there is no reason to suppose that the question which we have discussed was in his thought. We take it to be a sound principle, that no proposition of law can be said to be overruled by a court which was not in the mind of the court when the decision was made. *The Victory*, 6 Wall., 382.

The case, however, was well decided on the ground taken by Mr. Blair, counsel for defendant, namely: that such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one state to another, over the high seas, in conflict with that freedom of transit of goods and persons between one state and another, which is within the rule laid down in *Crandall v. Nevada*, *id.*, 35 (§§ 1269-73, *supra*), and with the authority of congress to regulate commerce among the states. We do not regard it, therefore, as opposing the views which we have announced in this case.

The case of *Brown v. Maryland*, as we have already said, arose out of a statute of that state, taxing, by way of discrimination, importers who sold, by wholesale, foreign goods. Chief Justice Marshall, in delivering the opinion of

the court; distinctly bases the invalidity of the statute, (1) On the clause of the constitution which forbids a state to levy imposts or duties on imports; and (2) That which confers on congress the power to regulate commerce with foreign nations, among the states, and with the Indian tribes. The casual remark, therefore, made in the close of the opinion, "that we suppose the principles laid down in this case to apply equally to importations from a sister state," can only be received as an intimation of what they might decide if the case ever came before them, for no such case was then to be decided. It is not, therefore, a judicial decision of the question, even if the remark was intended to apply to the first of the grounds on which that decision was placed.

But the opinion in that case discusses, as we have said, under two distinct heads, the two clauses of the constitution which he supposed to be violated by the Maryland statute, and the remark above quoted follows immediately the discussion of the second proposition, or the applicability of the commerce clause to that case. If the court then meant to say that a tax levied on goods from a sister state which was not levied on goods of a similar character produced within the state would be in conflict with the clause of the constitution giving congress the right "to regulate commerce among the states," as much as the tax on foreign goods, then under consideration, was in conflict with the authority "to regulate commerce with foreign nations," we agree to the proposition.

It may not be inappropriate here to refer to the License Cases, 5 How., 504 (§§ 1481-1518, *infra*). The separate and diverse opinions delivered by the judges on that occasion leave it very doubtful if any material proposition was decided, though the precise point we have here argued was before the court and seemed to require solution. But no one can read the opinions which were delivered without perceiving that none of them held that goods imported from one state into another are within the prohibition to the states to levy taxes on imports, and the language of the chief justice and Judge McLean leave no doubt that their views are adverse to the proposition. We are satisfied that the question, as a distinct proposition necessary to be decided, is before the court now for the first time.

§ 1473. *Although each state has a right to tax goods brought into it from another state, it cannot discriminate against such goods in favor of other products.*

But, we may be asked, is there no limit to the power of the states to tax the produce of their sister states brought within their borders? And can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory? The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another state, and whether the goods sold are the produce of that state or some other. There is no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the states or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, and therefore void. There is also, in addition to the restraints which those provisions impose by their own force on the states, the unquestioned power of congress, under the authority to regulate commerce



among the states, to interpose, by the exercise of this power, in such a manner as to prevent the states from any oppressive interference with the free interchange of commodities by the citizens of one state with those of another.

*Judgment affirmed.*

MR. JUSTICE NELSON dissented.

WARING v. THE MAYOR.

(8 Wallace, 110-123. 1868.)

ERROR to the Supreme Court of Alabama.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Merchants and traders, engaged in selling merchandise in the city of Mobile, in the state of Alabama, are required, by an ordinance passed by the corporate authorities, to pay a tax to the city equal to one-half of one per cent. on the gross amount of their sales, whether the merchandise was sold at private sale or at public auction; and if they were so engaged the six months next preceding the 1st day of April, 1866, they were also required, within fifteen days thereafter, to return, under oath, to the collector of taxes, the gross amount of their sales during that period of time; and the provision was, that if any such merchant or trader neglected or failed to make such return, he should be subject to such a fine, not exceeding \$50 per day, as the mayor of the city might impose for each day's failure or refusal.

Sales of merchandise were made by the complainant within that period to a large amount, and he was duly notified that he was required to make return, under oath, of the gross amount of such sales, and, having neglected and refused to comply with that requirement within the time specified in the ordinance, the mayor of the city caused a summons to be issued and duly served, commanding the complainant to appear before him, as such mayor, to answer for such neglect; but he refused to obey the commands of the summons, and thereupon a warrant was issued, and he was arrested and brought before the mayor to answer for such contempt; and, after hearing, he was sentenced to pay a fine of \$50 for a breach of the before-mentioned ordinance. Subsequently, a second notice of a similar character was given, and the complainant still neglecting and refusing to make the required returns, he was again summoned to appear before the mayor to answer for the neglect; but he refused a second time to obey the commands of the precept, and, thereupon, such proceedings were had that he was again found guilty of contempt and was sentenced to pay an additional fine of \$50.

Regarding these proceedings as unwarranted, the complainant filed a bill in equity against the mayor and tax collector of the city, in the local chancery court, in which he prayed that the respondents might be enjoined from collecting the fines adjudged against him, and from any attempt to collect the tax, and that the tax might be adjudged to be null and void. Proofs were taken and the parties were heard, and the final decree of the chancellor was, that the complainant was entitled to the relief asked, and that the injunction should be made perpetual; but that decree, on the appeal of the respondents to the supreme court of the state, was, in all things, reversed, and the supreme court entered a decree that the bill of complaint should be dismissed. Whereupon the complainant in the chancery court sued out a writ of error, under the twenty-fifth section of the judiciary act, and removed the cause into this court.

Exemption from state taxation in this case is claimed by complainant upon the ground that the sales made by him were of merchandise, in the original packages, as imported from a foreign country, and which was purchased by him in entire cargoes of the consignees of the importing vessels before their arrival, or while the vessels were in the lower harbor of the port. By the terms of the act of the 22d of July, 1813, it is provided, "that from and after the 1st day of August next, the town of Mobile shall be and the same is hereby established *the sole* port of entry for the district, including the shores, waters and inlets of the bay and river Mobile, and of the other rivers, creeks, inlets and bays emptying into the Gulf of Mexico, east of the said river Mobile, and west thereof, to the eastern boundary of the state of Louisiana." 3 Stat. at Large, 35.

Mobile is the sole port of entry of the district, and, next to New Orleans, is the largest cotton market in the United States, but vessels of large draft cannot cross the inner bar, and, consequently, are compelled to anchor in the lower harbor, some twenty or twenty-five miles below the city. Small vessels, such as can cross the inner bar, go up to the wharves to discharge and receive cargo, but large vessels, such as are usually employed to transport cotton, find their only anchorage in the lower harbor, where they are unloaded on their arrival, and where they receive their cargoes for the return voyage. Loading and unloading are accomplished by means of lighters, which sometimes are furnished by the ship and sometimes by the shipper, for the purpose of loading, and sometimes by the importer, and sometimes by the vendee of the merchandise for the purpose of unloading, and for transporting the same to the private stores of the purchasers or the public warehouses. The *Bark Edwin*, 1 Cliff., 325; S. C., 24 How., 389.

Ships frequently go there in ballast for cargoes of cotton, and those going there for that purpose from Liverpool frequently carry salt, using it in many cases as ballast instead of the articles more usually employed, which do not pay freight. Such shipments are made by the owners or charterers of the vessel, and the salt, whether stowed as cargo or used as ballast, is usually consigned to the agents of the vessel. Purchases of salt imported under such circumstances were made by the complainant to a very large amount, and the record shows that he sold the salt at his place of business in the city to traders and large consumers in the original packages. The contracts to purchase were made before the goods were entered at the custom-house, with the consignees of the salt, sometimes before and sometimes after the arrival of the vessel at the anchorage in the lower harbor; but the terms of the contract in all cases were that the risk should continue to be in the shipper until the salt was delivered to the complainant over the side of the vessel into his lighters. He agreed to furnish the lighters and to bring them alongside of the vessel, and the contract was that the salt, when it was transhipped into the lighters of the complainant, became his property, and he assumed the risk and expense of transporting the same to the wharf and from thence to his own warehouse or place of business; but if the goods were lost before such delivery, the agreement to purchase was not obligatory. Viewed in the light of these conceded facts, the defendants contend that the complainant was not the importer of the salt; that the salt was imported by the owners of the vessel, and that the sale of the salt as made by the consignees to the complainant was a sale of imported merchandise.

§ 1474. *Laws of the United States concerning importation and landing of goods and the payment of duties thereon.*

Goods imported from a foreign country are required to be entered at the custom-house of the port where the vessel voluntarily arrives with intent to unlade the cargo, and the settled law is that no one but the owner or consignee, or, in case of his sickness or absence, his agent or factor, is authorized to discharge that obligation. *The Mary*, 1 Gall., 206; *The Boston*, id., 239; *United States v. Lyman*, 1 Mason, 482; 1 Stat. at Large, 655; *Conard v. Pacific Ins. Co.*, 6 Pet., 262; *Gray v. Lawrence*, 3 Blatch., 117. Importers of foreign merchandise must conform to the requirements of law and the regulations of the treasury department. American ships are forbidden to bring goods from any foreign port into the United States unless the master thereof shall have on board a manifest in writing, signed by the proper person, describing the goods and the vessel, and containing the name of the port where the goods were taken on board, and the name of the port for which the same are consigned or destined. 1 Stat. at Large, 644.

Masters commanding any such ships, laden with such goods, on their arrival within four leagues of our coast, or within any of the bays, harbors, ports or inlets thereof, are required, upon demand, to produce such manifest to such officer of the customs as shall come on board their ship, for his inspection, and it is made the duty of the said officer of the customs to certify the fact of compliance with that requirement and the day when it was so produced. Next requirement is that the master shall, within twenty-four hours after the arrival of any such ship at any port established by law, or within any harbor, inlet or creek thereof, repair to the office of the chief officer of the customs and make a report of the arrival of the vessel. He may, if he sees fit, present his manifest at the same time, but if he omits so to do, the requirement is that he shall, within forty-eight hours, make a further report in writing to the collector of the district, which report shall be in form and shall contain all the particulars contained in the manifest. 1 id., 649.

Imported goods may be entered for consumption or for warehousing, but it will not be necessary to refer to the course of proceeding when the goods are deposited in warehouse, as all the importations in this case were entered for consumption. Such entry must be in writing, and must be made to the collector of the district within fifteen days after the required report is filed by the master. The form of the entry is prescribed by law and by the regulations of the treasury department, and the provision is that the owner or consignee making the entry shall also produce to the collector and naval officer, if any, the original invoice or invoices of the goods, or other documents received in lieu thereof or concerning the same, in the same state in which they were received, with the bills of lading for the importation. 1 Stat. at Large, 656; Gen. Reg. (1857), 145.

§ 1475. *Goods imported cannot be landed before a permit is granted; that cannot be granted before the duties are paid or secured to be paid.*

Goods imported in any ship or vessel from any foreign port or place are required to be landed in open day, and the express provision of law is that none such shall be landed or delivered from such ship or vessel "without a permit from the collector and naval officer, if any, for such unlading and delivery." Id., 665. Congress, therefore, has prescribed the rule of decision; and, while that provision remains in force, no goods brought in any ship or vessel from any foreign port or place, unless falling within some exceptional rule, can lawfully

be unladen or delivered from any such ship or vessel within the United States without a permit from the collector for such unlading or delivery; and the sixty-second section of the same act provides "that all duties on goods, wares and merchandise imported shall be paid, *or secured to be paid*, before a permit shall be granted for landing the same;" which shows to a demonstration that all the salt in this case was imported before the property in the same became vested in the complainant. *Id.*, 673.

Authority to grant a permit does not exist until the duties are paid or secured to be paid, and the duties are never paid or secured to be paid before the goods are imported, nor before they are entered for consumption. Before the permit is received by the inspector on board the ship or vessel, no one has authority to remove the hatches or to break bulk, but the cargo is under the charge of the officer of the customs. Following the notice of the arrival of the vessel and the exhibition of the manifest, the next step is to make the entry, which should always be accompanied by the invoice and bill of lading. Examination of the entry is usually made by the entry clerk, and, if found to be correct, the collector proceeds to estimate the duties "on the invoice, value and quantity," and if the estimated amount of duty is paid, *or secured to be paid*, as required by law, the collector certifies the invoice and grants a permit in due form for the delivery of the cargo, first designating the packages, one in ten, to be sent to the public store for examination, and marking the same on the entry, invoice and permit. *Gen. Reg.* (1857), 145.

Reference need not be made to the subsequent proceedings of the appraisers, weighers and gaugers preparatory to the liquidation of the duties, as no one pretends that any of those acts can be performed before the goods are imported. In order to obtain a permit to discharge the salt into the lighters in this case, the proof is full to the point that a deposit of coin had to be made at the custom-house by the consignees, and that the duties were finally paid by them as liquidated, after the true weight of the salt was ascertained by the return of the weighers. They made the entries, presented the invoices and bills of lading, made the necessary deposit of coin for the estimated amount of the duties, and procured the permits; and when the duties were finally liquidated as required by law and the regulations of the treasury department, they adjusted and paid the balance.

§ 1476. *Where a contract was that goods should be at vendor's risk until delivered, the vendee cannot claim the privileges of the importer.*

Whether the contracts to purchase were made before or after the vessel arrived in the bay is quite immaterial, as the agreement was that the risk should continue to be in the owner or consignees until they delivered the salt into the complainant's lighters, alongside of the vessel. Delivery, under the terms of the contract, could not be made before the vessel arrived, nor before the salt was legally entered at the custom-house, as the hatches could not be removed for any such purpose until the permit was received from the collector. Undoubtedly goods at sea may be sold by the consignees to arrive, and if they indorse and deliver the bill of lading to the purchaser, and he accepts the same under the contract as the proper substitute for the actual delivery and acceptance of the goods, the effect of the transaction is to vest a perfect title in the purchaser, discharged of all right of stoppage *in transitu* on the part of the vendor and indorser of the bill of lading. *Audenried v. Randall*, 16 Am. L. Reg., 664; *Newsom v. Thornton*, 6 East, 41; *Pratt v. Parkman*, 24 Pick., 42. Nothing of the kind, however, was done in this case. On the contrary the

agreement was that the loss, if before the delivery of the goods into the lighters, should fall on the shippers. Influenced by these considerations, the court is of the opinion that the shippers or consignees were the importers of the salt, and that the complainant was the purchaser of the importers, and the second vendor of the imported merchandise.

Opposed to that view is the suggestion that goods are not regarded as having been imported into the United States until the vessel transporting the same from the foreign market has arrived at some one of our maritime ports with the intent to unlade the cargo. Where the voyage *is not ended*, and *there is no obstruction to prevent its being continued*, the rule in that behalf is as contended by the complainant. Decided cases to that effect are quite numerous and decisive, as applied in controversies involving the inquiry whether the goods imported in a given case are affected by a new law or the repeal of an old one, whereby import duties are increased or diminished. *United States v. Vowell*, 5 Cranch, 372; *Schooner Mary*, 1 Gall., 209; *The Boston*, id., 245; *United States v. Arnold*, 1 id., 353; *United States v. Lindsey*, 1 id., 265; *Harrison v. Vose*, 9 How., 381; *United States v. Lyman*, 1 Mason, 482; *Meredith v. United States*, 13 Pet., 494.

Well-founded exceptions, however, exist to that general rule, and among the number is one created by the eighty-fifth section of the principal collection act. 1 Stat. at Large, 694. By that section it is provided that where a ship or vessel shall be prevented by ice from getting to the port or place at which her cargo is intended to be delivered, the collector of the district may receive the report and entry of such ship or vessel, . . . and grant a permit for unloading or landing the goods imported, at any place within his district, which shall appear to him most convenient and proper. Variations from the usual course of proceedings in such matters are also necessarily made at all the ports and places where lighters are required in loading and unloading ships and vessels engaged in commerce and navigation.

More than half a century has elapsed since the act of congress was passed establishing the town of Mobile the sole port of entry for that district, and the record furnishes abundant reason to conclude that the course of proceedings throughout that entire period, in respect to imported goods brought there from foreign countries in ships and vessels whose draft was such that they could not cross the inner bar, has been the same as that heretofore described. Permanent as the obstruction to navigation is, the case is much stronger even than the one for which provision is made in the principal collection act, and after such long acquiescence by all interested in the course pursued by the officers of the customs, the court is of the opinion that the proceedings may well be sustained.

Congress has the power to regulate commerce with foreign nations and among the several states, and with the Indian tribes, and the constitution also provides that no state shall, without the consent of the congress, lay any imposts or duties on imports or exports; except what may be absolutely necessary for executing its inspection laws, with a view to raise a revenue for state purposes. The state of Maryland passed a law requiring all importers of foreign articles, enumerated in the law, and other persons selling the same by wholesale, before they should be authorized to sell the imported articles, to take a license, for which they were required to pay \$50, and in case of refusal or neglect, the provision was, that they should forfeit the amount of the license tax and be subject to a fine of \$100. *Brown v. State of Maryland*, 12 Wheat., 437

(§§ 1466-70, *supra*). Subsequently an importing merchant, resident in the state, refused to pay the tax, and the state court sustained the validity of the state law, and imposed on him the penalty therein prescribed. Dissatisfied with the judgment he removed the cause into this court by writ of error, and this court held, Marshall, C. J., giving the opinion of the court, that the state law was a tax on imports, and that the mode of levying it, as by a tax on the occupation of the importer, merely varied the form in which the tax was imposed without varying the substance; that while the articles imported remained the property of the importer in his warehouse in the original forms or packages in which they were imported, a tax upon them was too plainly a duty on imports to escape the prohibition of the constitution; but the court admitted that whenever the importer has so acted upon the thing imported that it has become incorporated and mixed with the mass of property in the country, it must be considered as having lost its distinctive character as an import, and as having become subject to the taxing power of the state.

§ 1477. *Sales of goods by the importer are exempt from state taxation, but the privilege does not extend to his vendee.*

Sales by the importer are held to be exempt from state taxation because the importer purchases, by the payment of the duty, a right to dispose of the merchandise as well as to bring it into the country, and because the tax, if it were held to be valid, would intercept the import, as an import, in the way to become incorporated with the general mass of property, and would deny it the privilege of becoming so incorporated until it should have contributed to the revenue of the state. *Brown v. State of Maryland*, 12 Wheat., 443 (§§ 1466-70, *supra*); *Almy v. State of California*, 24 How., 173 (§ 1465, *supra*). But the sales of the goods imported in this case were made by the shippers or consignees, and the complainant was the purchaser, and not the first vendor of the imported merchandise; and it is settled law in this court that merchandise in the original packages once sold by the importer is taxable as other property. *Pervear v. Commonwealth*, 5 Wall., 479. When the importer sells the imported articles, or otherwise mixes them with the general property of the state by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer. Importers selling the imported articles in the original packages are shielded from any such state tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import.

*Decree affirmed.*

COOK v. PENNSYLVANIA.

(7 Otto, 566-575. 1878.)

ERROR to the Supreme Court of Pennsylvania.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The act of the legislature of Pennsylvania, of May 20, 1853 (Pamphlet Laws, 683), declares that "the state duty to be paid on sales by auction in the counties of Philadelphia and Allegheny shall be on all domestic articles and groceries, one-half of one per cent.; on foreign drugs, glass, earthenware, hides, marble-work, and dye-woods, three-quarters of one per cent."

By the sixth section of the act of April 9, 1859, the law was modified as

follows: "Said auctioneer shall pay into the treasury of the commonwealth a tax or duty of one-fourth of one per cent. on all sales of loans or stocks, and shall also pay into the treasury aforesaid a tax or duty, as required by existing laws, on all other sales to be made as aforesaid, except on groceries, goods, wares and merchandise of American growth or manufacture, real estate, shipping or live-stock; and it shall be the duty of the auctioneer having charge of such sales to collect and pay over to the state treasurer the said duty or tax, and give a true and correct account of the same quarterly, under oath or affirmation, in the form now required by law." Pamphlet Laws, 436.

The effect of this legislation is, that by the first statute a discrimination of one-fourth of one per cent. is made against foreign goods sold at auction; and by the last statute, while all sales of foreign or imported goods are taxed, those arising from groceries, goods, wares and merchandise of American growth or manufacture are exempt from such tax. It appears that the law also required these auctioneers to take out a license, to make report of such sales, and to pay into the treasury the taxes on these sales. The defendant refused to pay the tax for which he was liable under this law, for the sale of goods which had been imported, and which he had sold for the importers in the original packages. In the suit, in which judgment was rendered against him in the supreme court of Pennsylvania, he defended himself on the ground that these statutes were void, because forbidden by sections 8 and 10 of article 1 of the constitution of the United States.

§ 1478. *A tax on the amount of goods sold at auction is a tax upon the goods and not upon the auctioneer.*

The clauses referred to are those which give to congress power to regulate commerce with foreign nations, and forbid a state, without the consent of congress, to levy any imposts or duties on imports. The case stated shows that the goods sold by defendant were imported goods, and that they were sold by him in the packages in which they were originally imported. It is conceded by the attorney-general of the state, that, if the statute we have recited is a tax on these imports, it is justly obnoxious to the objection taken to it. But it is argued that the authority of the auctioneer to make any sales is derived from the state, and that the state can, therefore, impose upon him a tax for the privilege conferred, and that the mode adopted by the statute of measuring that tax is within the power of the state. That being a tax on him for the right or privilege to sell at auction, it is not a tax on the article sold, but the amount of the sales made by him is made the measure of the tax on that privilege. In support of this view, it is said that the importer could himself have made sale of his goods without subjecting the sale to the tax. The argument is fallacious, because without an auctioneer's license he could not have sold at auction even his own goods. If he had procured, or could have procured, a license, he would then have been subject by the statute to the tax, for it makes no exception. By the express language of the statute, the auctioneer is to collect this tax and pay it into the treasury. From whom is he to collect it if not from the owner of the goods? If the tax was intended to be levied on the auctioneer, he would not have been required first to collect it and then pay it over. It was, then, a tax on the privilege of selling foreign goods at auction, for such goods could only be sold at auction by paying the tax on the amount of the sales.

The question as thus stated has long ago and frequently been decided by this court. In *Passenger Cases*, 7 How., 283 (§§ 1284-1335, *supra*), a statute

of New York was the subject of consideration, which required an officer of the city of New York, called the health commissioner, to collect from the master of every vessel from a foreign port, for himself and each cabin passenger on board his vessel, \$1.50, and for each steerage passenger, mate, sailor or mariner, \$1. A statute of the state of Massachusetts was also considered, which enacted that no alien passengers (other than certain diseased persons and paupers, provided for in a previous section) should be permitted to land until the master, owner, consignee or agent of such vessel should pay to the regularly appointed boarding officers the sum of \$2 for each passenger so landing. In both instances, although the master or the owner of the vessel was made to pay the sum demanded, it was held to be a tax on the passengers. It was he whose loss it was when paid, and the burden rested ultimately and solely on him. Mr. Chief Justice Taney says: "It is demanded of the captain, and not from every separate passenger, for the convenience of collection. But the burden evidently falls on the passenger, and he, in fact, pays it, either in the enhanced price of his passage, or directly to the captain, before he is allowed to embark for the voyage." Because it was such a tax, the majority of the court held it to be unconstitutional and void.

In the case of *Crandall v. State of Nevada*, 6 Wall., 35 (§§ 1269-73, *supra*), the state had passed a law requiring those in charge of all the stage-coaches and railroads doing business in the state to make report of every passenger who passed through the state or went out of it by their conveyances, and to pay a tax of \$1 for every such passenger. The argument was urged there that the tax was laid on the business of the railroad and stage-coach companies, and the sum of \$1 exacted for each passenger was only a mode of measuring the business to be taxed. But the court said, as in *Passenger Cases*, that it was a tax which must fall on the passenger, and be paid by him for the privilege of riding through the state by the usual vehicles of travel.

In case of *State Freight Tax*, 15 id., 232 (§§ 1255-62, *supra*), Mr. Justice Strong says: "The case presents the question whether the statute in question—so far as it imposes a tax upon freight taken up within the state and carried out of it, or taken up outside the state and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the state—is not repugnant to the provision of the constitution of the United States." It was argued here again that the tax was one on the business and franchises of the railroad companies which were required to pay it; but the court, reviewing the authorities, said that the inquiry was, upon what did the burden really rest, and not upon the question from whom the state exacted payment into its treasury. This language was abundantly supported by the cases concerning tax on the national banks, namely, *Bank of Commerce v. New York City*, 2 Black, 620 (§§ 408-413, *supra*); *Bank Tax Cases*, 2 Wall., 200 (§§ 414-416, *supra*); *Society for Savings v. Coite*, 6 id., 594; *Provident Institution v. Massachusetts*, id., 611.

In *Henderson v. Mayor of New York*, 92 U. S., 259 (§§ 1336-42, *supra*), where the owners of vessels from a foreign port were required to give a bond as security that every passenger whom they landed should not become a burden on the state, or pay for every such passenger a fixed sum, it was held to be in effect a tax of that sum on the passenger, however disguised by the alternative of a bond which would never be given. The court said that, "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute,



as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore and landed at the port of New York, it is as much a tax on passengers, if collected from them, or a tax on the vessel or owner for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases."

§ 1479. *A tax on foreign goods sold at auction is a duty on imports, and a state law levying such tax is void.*

To the same effect, and probably more directly in point, is the case of *Welton v. State of Missouri*, 91 id., 275 (§§ 1379-83, *supra*), decided at the same term. In that case, peddlers were required, under a severe penalty, to take out a license; and those only were held to be peddlers who dealt in goods, wares and merchandise which were not of the growth, produce or manufacture of the state. The court, after referring to the case of *Brown v. Maryland* (12 Wheat., 419; §§ 1466-70, *supra*), relied on by defendant here, adds: "So, in like manner, the license tax exacted by the state of Missouri from dealers in goods which are not the product or manufacture of the state, before they can be sold from place to place within the state, must be regarded as a tax upon such goods themselves; and the question presented is, whether legislation, thus discriminating against the products of other states in the conditions of their sale by a certain class of dealers, is valid under the constitution of the United States." And it was decided that it was not. See, also, *Waring v. The Mayor*, 8 Wall., 110 (§§ 1474-77, *supra*). The tax on sales made by an auctioneer is a tax on the goods sold, within the terms of this last decision, and, indeed, within all the cases cited; and when applied to foreign goods sold in the original packages of the importer, before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports.

§ 1480. *Discrimination against foreign goods is a regulation of commerce.*

In *Woodruff v. Parham*, 8 Wall., 123 (§§ 1471-73, *supra*), and *Hinson v. Lott*, id., 148, it was held that a tax laid by a law of the state in such a manner as to discriminate unfavorably against goods which were the product or manufacture of another state was a regulation of commerce between the states, forbidden by the constitution of the United States. The doctrine is reasserted in the case of *Welton v. State of Missouri*, *supra*. The congress of the United States is granted the power to regulate commerce with foreign nations in precisely the same language as it is that among the states. If a tax assessed by a state injuriously discriminating against the products of a state of the Union is forbidden by the constitution, a similar tax against goods imported from a foreign state is equally forbidden.

A careful reader of the history of the times which immediately preceded the assembling of the convention that framed the American constitution cannot fail to discover that the need of some equitable and just regulation of commerce was among the most influential causes which led to its meeting. States having fine harbors imposed unlimited tax on all goods reaching the continent through their ports. The ports of Boston and New York were far behind Newport, in the state of Rhode Island, in the value of their imports; and that small state was paying all the expenses of her government by the duties levied on the goods landed at her principal port. And so reluctant was she to give up this advantage, that she refused for nearly three years after the other twelve original states had ratified the constitution, to give it her assent.

In granting to congress the right to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, and in forbidding the states, without the consent of that body, to levy any tax on imports, the framers of the constitution believed that they had sufficiently guarded against the dangers of any taxation by the states which would interfere with the freest interchange of commodities among the people of the different states, and by the people of the states with citizens and subjects of foreign governments.

The numerous cases in which this court has been called on to declare void statutes of the states which in various ways have sought to violate this salutary restriction show the necessity and value of the constitutional provision. If certain states could exercise the unlimited power of taxing all the merchandise which passes from the port of New York through those states to the consumers in the great west, or could tax — as has been done until recently — every person who sought the seaboard through the railroads within their jurisdiction, the constitution would have failed to effect one of the most important purposes for which it was adopted. A striking instance of the evil and its cure is to be seen in the recent history of the states now composing the German Empire. A few years ago they were independent states, which, though lying contiguous, speaking a common language, and belonging to a common race, were yet without a common government. The number and variety of their systems of taxation and lines of territorial division necessitating customs officials at every step the traveler took or merchandise was transported, became so intolerable that a commercial, though not a political, union was organized, called the German Zollverein. The great value of this became so apparent, and the community of interest so strongly felt in regard to commerce and traffic, that the first appropriate occasion was used by these numerous principalities to organize the common political government now known as the German Empire. While there is, perhaps, no special obligation on this court to defend the wisdom of the constitution of the United States, there is the duty to ascertain the purpose of its provisions, and to give them full effect when called on by a proper case to do so.

The judgment of the supreme court of Pennsylvania will be reversed, and the case remanded for further proceedings in conformity with this opinion; and it is so ordered.

#### LICENSE CASES.

THURLOW *v.* MASSACHUSETTS—FLETCHER *v.* RHODE ISLAND AND PROVIDENCE PLANTATIONS—PEIRCE *v.* NEW HAMPSHIRE.

(5 Howard, 504-633. 1846.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—In the cases of *Thurlow v. The State of Massachusetts*, of *Fletcher v. The State of Rhode Island*, and of *Peirce et al. v. The State of New Hampshire*, the judgments of the respective state courts are severally affirmed.

The justices of this court do not, however, altogether agree in the principles upon which these cases are decided, and I therefore proceed to state the grounds upon which I concur in affirming the judgments. The first two of these cases depend upon precisely the same principles; and, although the case against the state of New Hampshire differs in some respects from the others, yet there are important principles common to all of them, and on that account it is more convenient to consider them together. Each of the cases has arisen upon

state laws, passed for the purpose of discouraging the use of ardent spirits within their respective territories, by prohibiting their sale in small quantities, and without licenses previously obtained from the state authorities. And the validity of each of them has been drawn in question, upon the ground that it is repugnant to that clause of the constitution of the United States which confers upon congress the power to regulate commerce with foreign nations, and among the several states. The cases have been separately and fully and ably argued, and the questions which they involve are undoubtedly of the highest importance. But the construction of this clause in the constitution has been so fully discussed at the bar and in the opinions delivered by the court in former cases, that scarcely anything can be suggested at this day calculated to throw much additional light upon the subject, or any argument offered which has not heretofore been considered and commented on, and which may not be found in the reports of the decisions of this court.

It is not my purpose to enter into a particular examination of the various passages in different opinions of the court, or of some of its members, in former cases, which have been referred to by counsel, and relied upon as supporting the construction of the constitution for which they are respectively contending. And I am the less inclined to do so, because I think these controversies often arise from looking to detached passages in the opinions, where general expressions are sometimes used, which, taken by themselves, are susceptible of a construction that the court never intended should be given to them, and which, in some instances, would render different portions of the opinion inconsistent with each other. It is only by looking to the case under consideration at the time, and taking the whole opinion together, in all its bearings, that we can correctly understand the judgment of the court.

§ 1481. *Every state may regulate its own internal traffic.*

The constitution of the United States declares that that constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. It follows that a law of congress, regulating commerce with foreign nations, or among the several states, is the supreme law; and if the law of a state is in conflict with it, the law of congress must prevail, and the state law cease to operate so far as it is repugnant to the law of the United States. It is equally clear that the power of congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several states; and that beyond these limits the states have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every state, therefore, may regulate its own internal traffic, according to its own judgment, and upon its own views of the interest and well-being of its citizens. I am not aware that these principles have ever been questioned. The difficulty has always arisen on their application; and that difficulty is now presented in the Rhode Island and Massachusetts cases, where the question is, how far a state may regulate or prohibit the sale of ardent spirits, the importation of which from foreign countries has been authorized by congress. Is such a law a regulation of foreign commerce, or of the internal traffic of the state?

§ 1482. *Power of the states to tax imported articles.*

It is unquestionably no easy task to mark, by a certain and definite line, the division between foreign and domestic commerce, and to fix the precise point,

in relation to every imported article, where the paramount power of congress terminates, and that of the state begins. The constitution itself does not attempt to define these limits. They cannot be determined by the laws of congress or the states, as neither can, by its own legislation, enlarge its own powers, or restrict those of the other. And as the constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the constitution.

This question came directly before the court, for the first time, in the case of *Brown v. The State of Maryland*, 12 Wheat., 419. And the court there held that an article authorized by a law of congress to be imported, continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported; and that no state, either by direct assessment, or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of congress had itself imposed; but that, when the original package was broken up, for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the state, and might be taxed for state purposes, and the sale regulated by the state, like any other property. This, I understand, to be substantially the decision in the case of *Brown v. The State of Maryland*, drawing the line between foreign commerce, which is subject to the regulation of congress, and internal or domestic commerce, which belongs to the states, and over which congress can exercise no control.

I argued the case in behalf of the state, and endeavored to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the state, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the state more than a sound construction of the constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the supreme court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the states on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of the state government. The immense amount of foreign products used and consumed in this country are imported, landed and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the state in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the state, but by citizens of other states or for-

eigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu*, and on their way to distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for state purposes, whether by direct assessment, or indirectly by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a state. A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a state is permitted to levy it in any form, it will put it in the power of a maritime importing state to raise a revenue for the support of its own government from citizens of other states, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports. Such a power in a state would defeat one of the principal objects of forming and adopting the constitution. It cannot be done directly in the shape of a duty on imports, for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the constitution which would enable a state to accomplish precisely the same thing under another name, and in a different form.

Undoubtedly a state may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the state. Nor, indeed, can it even influence materially the price of the commodity to the consumer, since foreigners, as well as citizens of other states, who are not chargeable with the tax, may import goods into the same place and offer them for sale in the same market, and with whom the resident merchant necessarily enters into competition.

§ 1483. *If the laws of congress authorize the importation of ardent spirits no state can prohibit such importation.*

Adopting, therefore, the rule as laid down in *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466–70, *supra*), I proceed to apply it to the cases of Massachusetts and Rhode Island. The laws of congress regulating foreign commerce authorize the importation of spirits, distilled liquors and brandy, in casks or vessels not containing less than a certain quantity, specified in the laws upon this subject. Now, if the state laws in question came in collision with those acts of congress, and prevented or obstructed the importation or sale of these articles by the importer in the original cask or vessel in which they were imported, it would be the duty of this court to declare them void. It has, indeed, been suggested that, if a state deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice and pauperism into the state, it may constitutionally refuse to permit its importation, notwithstanding the laws of congress; and that a state may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence or pauperism from abroad. But it must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to

be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property exists. And congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded, and may therefore admit or not, as it shall seem best, the importation of ardent spirits. And inasmuch as the laws of congress authorize their importation, no state has a right to prohibit their introduction.

§ 1484. — *but it may prohibit the retail of ardent spirits.*

But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of congress authorize it to be imported. These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce and become a part of the general mass of property in the state. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a state is bound to receive and to permit the sale by the importer of any article of merchandise which congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper. Of the wisdom of this policy, it is not my province or my purpose to speak. Upon that subject, each state must decide for itself. I speak only of the restrictions which the constitution and laws of the United States have imposed upon the states. And as these laws of Massachusetts and Rhode Island are not repugnant to the constitution of the United States, and do not come in conflict with any law of congress passed in pursuance of its authority to regulate commerce with foreign nations and among the several states, there is no ground upon which this court can declare them to be void.

I now come to the New Hampshire case, in which a different principle is involved,— the question, however, arising under the same clause in the constitution and depending on its construction. The law of New Hampshire prohibits the sale of distilled spirits, in any quantity, without a license from the selectmen of the town in which the party resides. The plaintiffs in error, who were merchants in Dover, in New Hampshire, purchased a barrel of gin in Boston, brought it to Dover, and sold it in the cask in which it was imported, without a license from the selectmen of the town. For this sale they were indicted, convicted and fined under the law above mentioned.

The power to regulate commerce among the several states is granted to congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is co-extensive with it. And, according to the doctrine in *Brown v. Maryland*, the article in question, at the time of the sale, was subject to the legislation of congress. The present case, however, differs

from *Brown v. State of Maryland* in this,—that the former was one arising out of commerce with foreign nations, which congress had regulated by law; whereas the present is a case of commerce between two states, in relation to which congress has not exercised its power. Some acts of congress have indeed been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one state to another. This case differs also from the cases of *Massachusetts and Rhode Island*; because, in these two cases, the laws of the states operated upon the articles after they had passed beyond the limits of foreign commerce, and consequently were beyond the control and power of congress. But the law of *New Hampshire* acts directly upon an import from one state to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation. The question, therefore, brought up for decision is, whether a state is prohibited by the constitution of the United States from making any regulations of foreign commerce, or of commerce with another state, although such regulation is confined to its own territory and made for its own convenience or interest, and does not come in conflict with any law of congress. In other words, whether the grant of power to congress is of itself a prohibition to the states, and renders all state laws upon the subject null and void. This is the question upon which the case turns; and I do not see how it can be decided upon any other ground, provided we adopt the line of division between foreign and domestic commerce as marked out by the court in *Brown v. State of Maryland*. I proceed, therefore, to state my opinion upon it.

§ 1485. *The mere grant of a power to the general government by the constitution is not an absolute prohibition thereof to the states.*

It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this court. But with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the states. The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred upon congress. Yet, in my judgment, the state may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of congress. Such evidently, I think, was the construction which the constitution universally received at the time of its adoption, as appears from the legislation of congress and of the several states; and a careful examination of the decisions of this court will show, that, so far from sanctioning the opposite doctrine, they recognize and maintain the power of the states.

The language in which the grant of power to the general government is made certainly furnishes no warrant for a different construction, and there is no prohibition to the states. Neither can it be inferred by comparing the provision upon this subject with those that relate to other powers granted by the constitution to the general government. On the contrary, in many instances, after the grant is made, the constitution proceeds to prohibit the exercise of the same power by the states in express terms; in some cases absolutely, in others

without the consent of congress. And if it was intended to forbid the states from making any regulations of commerce, it is difficult to account for the omission to prohibit it, when that prohibition has been so carefully and distinctly inserted in relation to other powers, where the action of the state over the same subject was intended to be entirely excluded. But if, as I think, the framers of the constitution (knowing that a multitude of minor regulations must be necessary, which congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme upon this subject over that of the states, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. The supremacy of the laws of congress in cases of collision with state laws is secured in the article which declares that the laws of congress, passed in pursuance of the powers granted, shall be the supreme law; and it is only where both governments may legislate on the same subject that this article may operate. For if the mere grant of power to the general government was in itself a prohibition to the states, there would seem to be no necessity for providing for the supremacy of the laws of congress, as all state laws upon the subject would be *ipso facto* void, and there could, therefore, be no such thing as conflicting laws, nor any question about the supremacy of conflicting legislation. It is only where both may legislate on the subject that the question can arise.

I have said that the legislation of congress and the states has conformed to this construction from the foundation of the government. This is sufficiently exemplified in the laws in relation to pilots and pilotage, and the health and quarantine laws. In relation to the first, they are admitted on all hands to belong to foreign commerce, and to be subject to the regulations of congress, under the grant of power of which we are speaking. Yet they have been continually regulated by the maritime states, as fully and entirely since the adoption of the constitution as they were before; and there is but one law of congress (5 Stats. at Large, 153) making any specific regulation upon the subject, and that passed as late as 1837, and intended, as it is understood, to alter only a single provision of the New York law, leaving the residue of its provisions entirely untouched. It is true that the act of 1789 (1 id., 54) provides that pilots shall continue to be regulated by the laws of the respective states then in force, or which may thereafter be passed, until congress shall make provision on the subject. And undoubtedly congress had the power, by assenting to the state laws then in force, to make them its own, and thus make the previous regulations of the states the regulations of the general government. But it is equally clear, that, as to all future laws by the states, if the constitution deprived them of the power of making any regulations on the subject, an act of congress could not restore it. For it will hardly be contended that an act of congress can alter the constitution, and confer upon a state a power which the constitution declares it shall not possess. And if the grant of power to the United States to make regulations of commerce is a prohibition to the states to make any regulation upon the subject, congress could no more restore to the states the power of which it was thus deprived than it could authorize them to coin money, or make paper money a tender in the payment of debts, or to do any other act forbidden to them by the constitution. Every pilot law in the commercial states has, it is believed, been either modified or passed since the act of 1789 adopted those then in force; and the provisions since made are all void, if the restriction on the power of the states now contended for should



be maintained; and the regulations made, the duties imposed, the securities required, and penalties inflicted by these various state laws are mere nullities, and could not be enforced in a court of justice. It is hardly necessary to speak of the mischiefs which such a construction would produce to those who are engaged in shipping, navigation and commerce. Up to this time their validity has never been questioned. On the contrary, they have been repeatedly recognized and upheld by the decisions of this court; and it will be difficult to show how this can be done, except upon the construction of the constitution which I am now maintaining. So, also, in regard to health and quarantine laws. They have been continually passed by the states ever since the adoption of the constitution, and the power to pass them recognized by acts of congress, and the revenue officers of the general government directed to assist in their execution. Yet all of these health and quarantine laws are necessarily, in some degree, regulations of foreign commerce in the ports and harbors of the state. They subject the ship, and cargo, and crew to the inspection of a health officer appointed by the state; they prevent the crew and cargo from landing until the inspection is made, and destroy the cargo if deemed dangerous to health. And during all this time the vessel is detained at the place selected for the quarantine ground by the state authority. The expenses of these precautionary measures are also usually, and I believe universally, charged upon the master, the owner, or the ship, and the amount regulated by the state law, and not by congress. Now, so far as these laws interfere with shipping, navigation, or foreign commerce, or impose burdens upon either of them, they are unquestionably regulations of commerce. Yet, as I have already said, the power has been continually exercised by the states, has been continually recognized by congress ever since the adoption of the constitution, and constantly affirmed and supported by this court whenever the subject came before it.

The decisions of this court will also, in my opinion, when carefully examined, be found to sanction the construction I am maintaining. It is not my purpose to refer to all of the cases in which this question has been spoken of, but only to the principal and leading ones; and, first, to *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *supra*), because this is the case usually referred to and relied on to prove the exclusive power of congress and the prohibition to the states. It is true that one or two passages in that opinion, taken by themselves, and detached from the context, would seem to countenance this doctrine. And, indeed, it has always appeared to me that this controversy has mainly arisen out of that case, and that this doctrine of the exclusive power of congress, in the sense in which it is now contended for, is comparatively a modern one, and was never seriously put forward in any case until after the decision of *Gibbons v. Ogden*, although it has been abundantly discussed since. Still, it seems to me to be clear, upon a careful examination of that case, that the expressions referred to do not warrant the inference drawn from them, and were not used in the sense imputed to them; and that the opinion in that case, when taken altogether and with reference to the subject-matter before the court, establishes the doctrine that a state may, in the execution of its powers of internal police, make regulations of foreign commerce; and that such regulations are valid unless they come into collision with a law of congress. Upon examining that opinion it will be seen that the court, when it uses the expressions which are supposed to countenance the doctrine of exclusive power in congress, is commenting upon the argument of counsel in favor of equal powers on this subject in the states and the general government, where neither

party is bound to yield to the other; and is drawing the distinction between cases of concurrent powers and those in which the supreme or paramount power was granted to congress. It therefore very justly speaks of the states as exercising their own powers in laying taxes for state purposes, although the same thing is taxed by congress; and as exercising the powers granted to congress when they make regulations of commerce. In the first case the state power is concurrent with that of the general government — is equal to it, and is not bound to yield. In the second, it is subordinate and subject to the superior and controlling power conferred upon congress. And it is solely with reference to this distinction, and in the midst of this argument upon it, that the court uses the expressions which are supposed to maintain an absolute prohibition to the states. But it certainly did not mean to press the doctrine to that extent. For it does not decide the case on that ground (although it would have been abundantly sufficient, if the court had entertained the opinion imputed to it), but, after disposing of the argument which had been offered in favor of concurrent powers, it proceeds immediately, in a very full and elaborate argument, to show that there was a conflict between the law of New York and the act of congress, and explicitly puts its decision upon that ground. Now the whole of this part of the opinion would have been unnecessary and out of place, if the state law was of itself a violation of the constitution of the United States, and therefore utterly null and void, whether it did or did not come in conflict with the law of congress.

Moreover, the court distinctly admits, on pages 205, 206, that a state may, in the execution of its police and health laws, make regulations of commerce, but which congress may control. It is very clear that, so far as these regulations are merely internal, and do not operate on foreign commerce, or commerce among the states, they are altogether independent of the power of the general government and cannot be controlled by it. The power of control, therefore, which the court speaks of, presupposes that they are regulations of foreign commerce, or commerce among the states. And if a state, with a view to its police or health, may make valid regulations of commerce which yet fall within the controlling power of the general government, it follows that the state is not absolutely prohibited from making regulations of foreign commerce within its own territorial limits, provided they do not come in conflict with the laws of congress.

It has been said, indeed, that quarantine and health laws are passed by the states, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States. And when the validity of a state law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon

the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the state from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

Upon this question, the object and motive of the state are of no importance and cannot influence the decision. It is a question of power. Are the states absolutely prohibited by the constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of the state, or whatever the real object of the law; and it requires no law of congress to control or annul them. Yet the case of *Gibbons v. Ogden*, 9 Wheat., 1, unquestionably affirms that such regulations may be made by a state, subject to the controlling power of congress. And if this may be done, it necessarily follows that the grant of power to the federal government is not an absolute and entire prohibition to the states, but merely confers upon congress the superior and controlling power. And to expound the particular passages hereinbefore mentioned in the manner insisted upon by those who contend for the prohibition, would be to make different parts of that opinion inconsistent with each other—an error which I am quite sure no one will ever impute to the very eminent jurist by whom the opinion was delivered.

And that the meaning of the court in the case of *Gibbons v. Ogden* was such as I have insisted on, is, I think, conclusively proved by the case of *Willson v. Blackbird Creek Marsh Co.*, 2 Pet., 251, 252 (§§ 1174-76, *supra*). In that case, a dam authorized by a state law had been erected across a navigable creek, so as to obstruct the commerce above it. And the validity of the state law was objected to, on the ground that it was repugnant to the constitution of the United States, being a regulation of commerce. But the court says: "The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several states; a power which has not been so exercised as to affect the question;" and then proceeds to decide that the law of Delaware could not "be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

The passages I have quoted show that the validity of the state law was maintained because it was not in conflict with a law of congress, although it was confessedly within the limits of the power granted. And it is worthy of remark, that the counsel for the plaintiff in error in that case relied upon *Gibbons v. Ogden* as conclusive authority to show the unconstitutionality of the state law, no doubt placing upon the passages I have mentioned the construction given to them by those who insist upon the exclusiveness of the power. This case, therefore, was brought fully to the attention of the court. And the decision in the last case, and the grounds on which it was placed, in my judgment, show most clearly what was intended in *Gibbons v. Ogden*; and that in that case, as well as in the case of *Willson v. Blackbird Creek Marsh Co.*, the court held that a state law was not invalid merely because it made regulations of commerce, but that its invalidity depended upon its repugnancy to a law of congress passed in pursuance of the power granted. And it is worthy, also, of remark, that the opinion in both of these cases was delivered by Chief Justice Marshall, and I consider his opinion in the latter one as an exposition of what he meant to decide in the former.

In the case of *City of New York v. Miln*, 11 Pet., 130 (§§ 1274-83, *supra*), the question as to the power of the states upon this subject was very fully dis-

cussed at the bar. But no opinion was expressed upon it by the court, because the case did not necessarily involve it, and there was great diversity of opinion on the bench. Consequently the point was left open, and has never been decided in any subsequent case in this court. For my own part, I have always regarded the cases of *Gibbons v. Ogden*, 9 Wheat., 1, and *Willson v. Blackbird Creek Marsh Co.*, 2 Pet., 245, as abundantly sufficient to sanction the construction of the constitution which in my judgment is the true one. Their correctness has never been questioned; and I forbear, therefore, to remark on the other cases in which this subject has been mentioned and discussed.

It may be well, however, to remark, that in analogous cases, where, by the constitution of the United States, power over a particular subject is conferred on congress without any prohibition to the states, the same rule of construction has prevailed. Thus, in the case of *Houston v. Moore*, 5 Wheat., 1 (§§ 161-190, *supra*), it was held that the grant of power to the federal government to provide for organizing, arming and disciplining the militia did not preclude the states from legislating on the same subject, provided the law of the state was not repugnant to the law of congress. And every state in the Union has continually legislated on the subject, and I am not aware that the validity of these laws has ever been disputed, unless they came in conflict with the law of congress. The same doctrine was held in the case of *Sturges v. Crowninshield*, 4 Wheat., 196 (§§ 1937-39, *infra*), under the clause in the constitution which gives to congress the power to establish uniform laws on the subject of bankruptcies throughout the United States.

And in the case of *Chirac v. Chirac*, 2 Wheat., 269, which arose under the grant of power to establish a uniform rule of naturalization, where the court speak of the power of congress as exclusive, they are evidently merely sanctioning the argument of counsel stated in the preceding sentence, which placed the invalidity of the naturalization under the law of Maryland, not solely upon the grant of power in the constitution, but insisted that the Maryland law was "virtually repealed by the constitution of the United States, and the act of naturalization enacted by congress." Undoubtedly it was so repealed, and the opposing counsel in the case did not dispute it. For the law of the United States covered every part of the Union, and there could not, therefore, by possibility, be a state law which did not come in conflict with it. And, indeed, in this case, it might well have been doubted whether the grant in the constitution itself did not abrogate the power of the states, inasmuch as the constitution also provided that the citizens of each state should be entitled to all the privileges and immunities of citizens in the several states; and it would seem to be hardly consistent with this provision to allow any one state, after the adoption of the constitution, to exercise a power which, if it operated at all, must operate beyond the territory of the state, and compel other states to acknowledge as citizens those whom it might not be willing to receive.

In referring to the opinions of those who sat here before us, it is but justice to them, in expounding their language, to keep in mind the character of the case they were deciding. And this is more especially necessary in cases depending upon the construction of the constitution of the United States, where, from the great public interests which must always be involved in such questions, this court have usually deemed it advisable to state very much at large the principles and reasoning upon which their judgment was founded, and to refer to and comment on the leading points made by the counsel on either side in the argument. And I am not aware of any instance in which the court have

spoken of the grant of power to the general government as excluding all state power over the subject, unless they were deciding a case where the power had been exercised by congress, and a state law came in conflict with it. In cases of this kind the power of congress undoubtedly excludes and displaces that of the state; because, wherever there is collision between them, the law of congress is supreme. And it is in this sense only, in my judgment, that it has been spoken of as exclusive in the opinions of the court to which I have referred. The case last mentioned is a striking example; for there the language of the court, affirming, in the broadest terms, the exclusiveness of the power, evidently refers to the argument of counsel stated in the preceding sentence.

§ 1486. *The law of New Hampshire, prohibiting the sale of liquor in any quantity without a license, etc., though the same be imported from another state, is valid.*

Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For, although the gin sold was an import from another state, and congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several states, yet, as congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the state may suppose to be its interest or duty to pursue. The judgment of the state courts ought, therefore, in my opinion, to be affirmed in each of the three cases before us.

#### THURLOW v. MASSACHUSETTS.

Opinion by MR. JUSTICE M'LEAN.

STATEMENT OF FACTS.—The plaintiff was indicted and convicted under the Revised Statutes of Massachusetts, ch. 47, and the act of 1837, ch. 242, for selling foreign spirits, in 1841 and 1842, without a license. The third section of the revised act provides that no person shall presume to be a retailer or seller of wine, brandy, rum or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, “under the penalty of \$20.” The seventeenth section authorizes the county commissioners to grant licenses; and the second section of the act of 1837 provides that nothing contained in that act, or in the forty-seventh chapter of the Revised Statutes, shall be so construed as to require the county commissioners to grant any licenses, when, in their opinion, the public good does not require them to be granted. On the trial in the court of common pleas, it was objected that a part of the spirits sold were foreign; but the court instructed the jury that such sale was in violation of the statute, which was not inconsistent with the constitution or revenue laws of the United States. On this ruling of the court an exception was taken, and the cause was removed to the supreme court of the state of Massachusetts, which overruled the exception, and entered a judgment on the verdict against the defendant.

§ 1487. *A state may prohibit the retail of imported liquors without a license.*

The acts of congress authorize the importation of spirits in casks of fifteen gallons, and wine in bottles. The great question in this case is, whether the license laws of Massachusetts are repugnant to the constitution of the United States, or the revenue laws which have been enacted under it. And, first, it is insisted that they are unconstitutional, as they prohibit the importer from

selling an article that he is authorized to import without the payment of an additional duty, or impost, which the state cannot impose.

The case of *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466–70, *supra*), is supposed to be conclusive upon this point. This may be admitted, and yet it does not rule the case before us. *Brown* was charged with having imported and sold a package of dry goods without a license. An act of Maryland required all importers, before the sale of their imported articles, to take out a license. And the court held “that a tax on the sale of an article, imported only for sale, is a tax on the article itself;” “that the importation gave a right to the importer to sell the package in question free from any charge by the state, and consequently that the act of Maryland was unconstitutional and void, as being repugnant to that article of the constitution which declares that no state shall lay any impost or duties on imports or exports.” The act was also held to be repugnant to that clause in the constitution which “empowers congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” In *Brown’s* case, the reasoning of the court and their decision turned upon the fact that he, being the importer of the package, had a right to sell it; that this right continued so long as the package was unbroken, and remained the property of the importer. The plaintiff, *Thurlow*, asserts no right as an importer of the article sold. He purchased it in the home market; consequently, neither the general reasoning nor the ruling of the court in *Brown’s* case can control this one.

The tenth amendment of the constitution declares that “the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” Before the adoption of the constitution, the states possessed, respectively, all the attributes of sovereignty. In their organic laws they had distributed their powers of government according to their own views, subject to such modifications as the people of each state might sanction. The agencies established by the articles of confederation were not entitled to the dignified appellation of government. Among the delegated functions, it is declared that “congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” This investiture of power is declared by this court, in the case of *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183–1201, *supra*), and also in *Brown v. State of Maryland*, “to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution.” There may be a limitation on the exercise of sovereign powers, but that state is not sovereign which is subject to the will of another. This remark applies equally to the federal and state governments. The federal government is supreme within the scope of its delegated powers, and the state governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them. From this it is clear, that while these supreme functions are exercised by the federal and state governments, within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the states are void, when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government.

The power to tax is common to the federal and state governments, and it

may be exercised by each in taxing the same property; but this produces no conflict of jurisdiction. The conflicts which have arisen are mainly attributable to the want of an accurate definition and a clear comprehension of the respective powers of the two governments. In a system of governments so complex as ours, it may be difficult, perhaps impracticable, to prescribe the exact limit, in particular cases, to federal and state powers. The powers expressly prohibited to the states are few in number, and are specified in the constitution. Those which are exclusively delegated to the federal government, and, consequently, by implication, are prohibited to the states, are more numerous. The states, resting upon their original basis of sovereignty, subject only to the exceptions stated, exercise their powers over everything connected with their social and internal condition. A state regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the state sovereignty as exclusively as powers exclusively delegated appertain to the general government.

The license acts of Massachusetts do not purport to be a regulation of commerce. They are essentially police laws. Enactments similar in principle are common to all the states. Since the adoption of its constitution they have existed in Massachusetts. A great moral reform, which enlisted the judgments and excited the sympathies of the public, has given notoriety to this course of legislation, and extended it, lately, beyond its former limit. And the question is now raised, whether the laws under consideration trench upon the power of congress to regulate foreign commerce. These laws do not, in terms, prohibit the sale of foreign spirits, but they require a license to sell any quantity less than twenty-eight gallons. Under the decision of *Brown v. Maryland*, it is admitted that the license acts cannot operate upon the right of the importer to sell. But after the import shall have passed out of the hands of the importer, whether it remain in the original package or cask, or be broken up, it becomes mingled with other property in the state, and is subject to its laws. This is the predicament of the spirits in question.

§ 1488. *A license for the sale of an article is a matter of police. Extent of the police power of the states.*

A license to sell an article, foreign or domestic, as a merchant, or innkeeper, or victualer, is a matter of police and of revenue, within the power of a state. It is strictly an internal regulation, and cannot come in conflict, saving the rights of the importer to sell, of any power possessed by congress. It is said to reduce the amount of importation, by lessening the profits of the thing imported. The license is a charge upon the business or profession, and not a duty upon the things sold. The same price is charged to every retailer of merchandise or spirits at the same place, without regard to the amount sold. This charge is in advance of any sales. It would be difficult to show that such a regulation reduced the amount of imported goods. But if this were the effect of the license, would that make the acts unconstitutional?

The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where contagious disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown into the sea. This comes in direct conflict with the regulation of commerce; and yet no one doubts the local

power. It is a power essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he be assailed by an assassin or approached by poison. And it is the settled construction of every regulation of commerce, that, under the sanction of its general laws, no person can introduce into a community malignant diseases, or anything which contaminates its morals or endangers its safety. And this is an acknowledged principle applicable to all general regulations. Individuals, in the enjoyment of their own rights, must be careful not to injure the rights of others. From the explosive nature of gunpowder, a city may exclude it. Now, this is an article of commerce, and is not known to carry infectious disease; yet, to guard against a contingent injury, a city may prohibit its introduction. These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of commerce, but acts of self-preservation. And although they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the state.

The objection is strongly and confidently urged, that a license may be refused under these laws, which would, in effect, prevent importation, as importation is only made to sell. It is admitted that a state law which shall prohibit importations of foreign spirits, being repugnant to the commercial power in the federal government, and contrary to the act of congress on that subject, would be void. The object of such a law would, upon its face, be a regulation of commerce, which is not within the powers of a state. But a state has a right to regulate the sale of this, as of every other imported article, out of the hands of the importer. The license system, as adopted in all the states, restrains persons from selling by retail who have not taken a license; and a license to retail spirits is granted by the court, or some other body, at its discretion, and on certain conditions. This is the character of the law under consideration. The applicant to obtain a license must be recommended by a majority of the selectmen of the town, as a person of good moral character. Should this recommendation be refused improperly or unjustly, an appeal is given to the commissioners of the county. But the commissioners are not required to grant any licenses, "when, in their opinion, the public good does not require them to be granted." There is no evidence in the record of a refusal to grant a license in this case. The plaintiff is charged with selling without a license; but it nowhere appears that he ever applied for one. This would seem to be conclusive. For if a state have a right to regulate the retail of foreign spirits, no one can retail them, where a license is required, without it. Now, that a state may do this, no one doubts. And it is equally clear, if the plaintiff rests upon a prohibition to sell, it must be shown. This does not appear on the face of the law, and if, in the exercise of their discretion, the commissioners have refused all licenses, that is a matter of fact which must be established. On this ground alone, admitting the force of the arguments for the plaintiff, his case must fail.

§ 1489. *Where the imported article is injurious to the health or morals of its inhabitants, the state may, in the exercise of its police power, entirely prohibit its sale.*

But, not to rest the decision of so important a question on a defect of proof, we will consider the case as if the fact of refusal to grant the license were in the record. The necessity of a license presupposes a prohibition of the right



to sell as to those who have no license. For if a state may require a license to sell, it may, in the exercise of a proper discretion, limit the number of such licenses as the public good may seem to require. This is believed to have been done under every system of licenses to retail spirits which has been adopted in the different states. And this limitation may possibly lessen the sale of the article. This may be the result of any regulation on the subject. But it constitutes no objection to the law. An innkeeper is forbidden to allow drunkenness in his house, and if this prohibition be observed, a less quantity of rum is sold. Is this unconstitutional because it may reduce the importation of the article? Such an argument would be so absurd as to be at once rejected by every sound mind. No one could fail to see that the injunction was laid for the maintenance of good order and good morals. To reject this view would make the excess of the drunkard a constitutional duty, to encourage the importation of ardent spirits. Such an argument would be advanced by no one, and no one would question either the constitutionality or expediency of the law which prohibits an innkeeper from encouraging drunkenness. And yet in this simple proposition is the argument answered against the constitutionality of the laws in question. A discretion on this subject must be exercised somewhere, and it can be exercised nowhere but under the state authority. The state may regulate the sale of foreign spirits, and such regulation is valid, though it reduce the quantity of spirits consumed. This is admitted. And how can this discretion be controlled? The powers of the general government do not extend to it. It is in every aspect a local regulation, and relates exclusively to the internal police of the state.

It is said that the object of these laws is to prohibit the importation of foreign spirits. This is an inference which their language does not authorize. A license is only required to sell in less quantity than twenty-eight gallons. A greater quantity than this may be sold without restriction. But it is said, if the legislature may require a license for twenty-eight gallons, it may extend the limitation to three hundred gallons. In answer to this it is enough to say that the legislature has not done what is supposed by the plaintiff's counsel it might do. But if the legislature cannot extend the license to twenty-eight gallons, what shall be the constitutional limit? By what rule shall it be ascertained? Shall a gallon, a quart, or a pint, be the limit? This is altogether arbitrary, and must depend upon the discretion of the law-making power; the same discretion that imposes a tax, defines offenses and prescribes their punishment, and which controls the internal policy of the state. Will it be contended that the legislature cannot exercise the power, as it may be exercised beyond the proper limit? This logic is not good when applied to the practical operations of the government. The argument is, power may be abused, therefore it cannot be exercised. What power dependent on human agency may not be abused?

§ 1490. *Great latitude allowed the states in exercising police power.*

In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgences spring up, which require restraints that can only be imposed by the legislative power. When this power shall be exerted, how far it shall be carried, and where it shall cease, must mainly depend upon the evil to be remedied. Under the pretense of a police regulation, a state cannot counteract the commercial power of congress.

And yet, as has been shown, to guard the health, morals and safety of the community, the laws of a state may prohibit an importer from landing his goods, and may sometimes authorize their destruction. But this exception to the operation of the general commercial law is limited to the existing exigency. Still, it is clear that a law of a state is not rendered unconstitutional by an incidental reduction of importation. And especially is this not the case when the state regulation has a salutary tendency on society, and is founded on the highest moral considerations.

§ 1491. *The police power of the states and the foreign commercial power of congress must be so exercised as not to interfere with each other.*

The police power of a state and the foreign commercial power of congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct and independent, and are essential to both governments. The one operates upon our foreign intercourse, the other upon the internal concerns of a state. The former ceases when the foreign product becomes commingled with the other property in the state. At this point the local law attaches, and regulates it as it does other property. The state cannot, with a view to encourage its local manufactures, prohibit the use of foreign articles, or impose such a regulation as shall in effect be a prohibition. But it may tax such property as it taxes other and similar articles in the state, either specifically or in the form of a license to sell. A license may be required to sell foreign articles, when those of a domestic manufacture are sold without one. And if the foreign article be injurious to the health or morals of the community, a state may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be imported containing deleterious ingredients, fatal to the health of those who use it, its sale may be prohibited.

When, in the appropriate exercise of these federal and state powers, contingently and incidentally their lines of action run into each other, if the state power be necessary to the preservation of the morals, the health or safety of the community, it must be maintained. But this exigency is not to be founded on any notions of commercial policy, or sustained by a course of reasoning about that which may be supposed to affect, in some degree, the public welfare. The import must be of such a character as to produce, by its admission or use, a great physical or moral evil. Any diminution of the revenue arising from this exercise of local power would be more than repaid by the beneficial results. By preserving, as far as possible, the health, the safety and the moral energies of society, its prosperity is advanced.

In *McCulloch v. State of Maryland*, 4 Wheat., 428 (§§ 380–398, *supra*), this court say: “It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.” “The people of a state, therefore, give to their government a right of taxing themselves and

their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against abuse."

§ 1492. *The Massachusetts law to regulate licenses for the sale of spirituous liquors is constitutional.*

Believing the laws of Massachusetts to regulate licenses for the sale of spirituous liquors to be constitutional, I affirm the judgment in this case.

PEIRCE v. NEW HAMPSHIRE.

STATEMENT OF FACTS.—This is a writ of error to the supreme court of New Hampshire, on a judgment given by that court sustaining the validity of the act of that state, "regulating the sale of wines and spirituous liquors," "approved 4th July, 1838," which is alleged to be in violation of the constitution of the United States, and the revenue acts of congress made in pursuance thereof. The first section provides: "That if any person shall, without license from the selectmen of the town, etc., sell any wine, rum, gin, brandy, or other spirits, in any quantity, etc., such person, so offending, for each and every such offense, etc., shall pay a sum not exceeding \$50," etc. The indictment charged the defendants in the state court with having sold one barrel of gin without a license. On the trial, it was proved that the barrel of gin was purchased by the defendants in Boston, brought coastwise to the landing at Piscataqua bridge, and thence to the defendants' store in Dover, and afterwards sold in the same barrel.

The views expressed by me in the case of *Thurlow v. The State of Massachusetts*, at the present term, as regards the power of a state to require a license for the sale of spirituous liquors, apply equally to the present case. A state may require a license to sell ardent spirits of domestic manufacture, as well as foreign. And the only difference between this case and the one above cited is, that the defendants imported this barrel of gin from the state of Massachusetts to that of New Hampshire, where they sold it; and they claim the right of importers to sell without a license.

§ 1493. *The prohibition against duties on imports has reference to foreign commerce.*

In the case of *Brown v. State of Maryland*, 12 Wheat., 449 (§§ 1466-70, *supra*), after sustaining the right of the importer to sell a package of foreign goods without a license, which an act of Maryland required, the court say: "It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a sister state." This remark of the court was incidental to the question before it, and the point was not necessarily involved in the decision. Whilst the remark cannot fail to be considered with the greatest respect, coming as it did from a most learned and eminent chief justice, yet it cannot be received as authority. It must have been made with less consideration than the other points ruled in that important case.

The power to regulate commerce among the several states is given to congress in the same words as the power over foreign commerce. But in the same article it is declared that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another." And it is supposed that the declaration "that no state, without the consent of congress, shall lay any impost or duties on imports or exports, except

what may be absolutely necessary for executing its inspection laws," refers to foreign commerce. A revenue to the general government could never have been contemplated from any regulation of commerce among the several states. Countervailing duties, under the confederation, were imposed by the different states to such an extent as to endanger the confederacy. But this cannot be done under the constitution by congress, in whom the power to regulate commerce among the states is vested.

The word import, in a commercial sense, means the goods or other articles brought into this country from abroad,—from another country. In this sense an importer is a person engaged in foreign commerce. And it appears that in the acts of congress which regulate foreign commerce he is spoken of in that light. In *Brown v. State of Maryland*, 12 Wheat., 443, the court say the act of Maryland "denies to the importer the right of using the privilege which he has purchased from the United States, until he has purchased it from the state." And it was upon the ground that the tax was an additional charge or impost upon the thing imported, which a state could not impose, that the above act was held to be unconstitutional.

§ 1494. *A state may require a license for the sale of liquors brought from other states.*

But neither the facts nor the reasons of that case apply to a person who transports an article from one state to another. In some cases, the transportation is only made a few feet or rods, and generally it is attended with little risk; and no duty is paid to the federal or state government. And why should property, when conveyed over a state line, be exempt from taxation which is common to all other property in the state? There is no act of congress to which the license law, as applied to this case, can be held repugnant. And the general "power in congress to regulate commerce among the several states," under the restrictions in the constitution, cannot affect the validity of the law. The constitution prohibits impost duties on a commercial interchange of commodities among the states. The tax in the form of a license, as here presented, counteracts no policy of the federal government, is repugnant to no power it can exercise, and is imposed by the exercise of an undoubted power in the state. The license system is a police regulation, and, as modified in the state of New Hampshire, was designed to restrain and prevent immoral indulgences, and to advance the moral and physical welfare of society. The owner of the property, who purchased it in Massachusetts and transported it to New Hampshire, is not an importer in the sense in which that term is used in the case of *Brown v. State of Maryland*. And there is nothing in the general reasoning of that case, or in the facts, which can bring into doubt the constitutionality of the New Hampshire law.

If the mere conveyance of property from one state to another shall exempt it from taxation, and from general state regulation, it will not be difficult to avoid the police laws of any state, especially by those who live at or near the boundary. If this tax had been laid on the property as an import into the state, the law would have been repugnant to the constitution. It would have been a regulation of commerce among the states, which has been exclusively given to congress. One of the objects in adopting the constitution was, to regulate this commerce, and to prevent the states from imposing a tax on the commerce of each other. If this power has not been delegated to congress, it is still retained by the states, and may be exercised at their discretion, as before the adoption of the constitution. For if it be a reserved power, congress can

neither abridge nor abolish it. But this barrel of gin, like all other property within the state of New Hampshire, was liable to taxation by the state. It comes under the general regulation, and cannot be sold without a license. The right of an importer of foreign spirits to sell in the cask, without a license, does not attach to the plaintiffs in error, on account of their having transported this property from Massachusetts to New Hampshire. I affirm the judgment of the state court.

## FLETCHER v. RHODE ISLAND.

STATEMENT OF FACTS.—This is a writ of error to the supreme court of Rhode Island, under the twenty-fifth section of the judiciary act of 1789. Fletcher was indicted for selling strong liquor, to wit, rum, gin and brandy, in less quantity than ten gallons, in violation of the law of Rhode Island. From the evidence, it appeared that the brandy which he sold was purchased by him at Boston, in the state of Massachusetts; that it was imported into the United States from France, for sale, and that the duties had been regularly paid at the port of Boston. The sale of the liquor was admitted by the defendant, as charged in the indictment. In the defense it was insisted that the license act was void, it being repugnant to that clause of the eighth section of the constitution of the United States which provides “that the congress shall have power to lay and collect taxes, duties, imposts and excises, to pay debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;” and is also repugnant to that clause of the eighth section which provides “that congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes;” and also repugnant to that clause which declares that “no state shall, without the consent of congress, lay any imposts or duties on imports, except what may be absolutely necessary for executing its inspection laws, and the acts of congress in pursuance of the aforesaid several clauses of said constitution,” etc. The supreme court of the state maintained the validity of the state statute, and to reverse that judgment this writ of error is prosecuted.

§ 1495. *The same reasons apply to this case as in the two preceding.*

The opinions given by me in the cases of *Thurlow v. State of Massachusetts*, and *Peirce v. State of New Hampshire*, 5 How., 586, 593, decide, so far as I am concerned, this case. The first case related to the sale of spirits of foreign importation, not in the hands of the importer; the second, to domestic spirits transported from one state to another. And the indictment, now under consideration, relates to the sale of foreign spirits, purchased in Massachusetts and transported to Rhode Island.

§ 1496. *A state law leaving it discretionary with a municipal corporation to grant or refuse a license to sell liquor at retail is not unconstitutional.*

There is, however, one point made in this case which was not embraced by the facts contained in either of the others. It was “agreed that the town council of Cumberland, in Rhode Island, refuse to grant any license for retailing strong liquors for a year from April, 1845, having been instructed to that effect by a town meeting.” The effect of this proceeding was to prohibit the sale of spirituous liquors in the town of Cumberland in less quantities than ten gallons. There is no constitutional objection to the exercise of this discretion under the authority of the state law. In the first place, no system of licenses to retail spirits has authorized the grant, except upon certain conditions. No one, it is presumed, can claim a license to retail spirits as a matter

of right. Under the law of the state, a discretion is to be exercised, not only as regards the individuals who apply, but also as to the number that shall be licensed in each town. And, if it shall be determined that a certain town is not entitled to a license, it is not perceived how such a decision can be controlled. In the case of Fletcher, it seems that the town council, who have the power to make the grant, were influenced to refuse it by the popular vote of the town. A more satisfactory mode of instructing public officers, it would seem, could not be adopted. This produces no restriction on the sale of spirits in any quantity exceeding ten gallons. And there is nothing in the record which shows that licenses are not granted in the adjacent towns within the state. But if this did appear, it would not avoid the force of the act. I think this regulation is clearly within the power of the state of Rhode Island, and, consequently, that the act is not repugnant to the constitution of the United States, or to any act of congress passed in pursuance of it. I therefore affirm the judgment of the supreme court.

PEIRCE v. NEW HAMPSHIRE.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—Andrew Peirce and two others were indicted for selling one barrel of gin, contrary to a statute of New Hampshire, passed in 1838, which provides that if any person shall, without license from the selectmen of the town where such person resides, sell any wine, rum, gin, brandy or other spirits, in any quantity, or shall sell any mixed liquors, part of which are spirituous, such person so offending, for each offense, on conviction upon an indictment, shall forfeit and pay a sum not exceeding \$50, nor less than \$25, for the use of the county. The barrel of gin had been purchased by the defendants at Boston, in the commonwealth of Massachusetts, and was brought coastwise by water near to Dover, in New Hampshire, where it was sold in the same barrel and condition that it had been purchased in Boston. Part of the regular business of the defendants was to sell ardent spirits in large quantities.

The defendants' counsel contended, on the trial, that the statute of 1838 was unconstitutional and void, because the same is in violation of certain public treaties of the United States with Holland, France and other countries, containing stipulations for the admission of spirits into the United States, and because it is repugnant to the two following clauses in the constitution of the United States, namely: "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." "The congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In answer to these objections, the court instructed the jury that the statute of July 4, 1838, was not entirely void, if it might have an operation constitutionally in any case; and that, as far as this case was concerned, it could not be in violation of any treaty with any foreign power which had been referred to, permitting the introduction of foreign spirits into the United States, because the liquor in question here was proved to be American gin. The court further instructed the jury that this statute, as it regarded this case, was not repugnant to the clause in the constitution of the United States providing that no state shall, without the consent of congress, lay any duty on imports or exports, because the gin in this case was not a foreign article, and was not imported into, but had been manufactured in, the United States. The court

further instructed the jury that this state could not regulate commerce between this and other states; that this state could not prohibit the introduction of articles from another state with such a view, nor prohibit a sale of them with such a purpose; but that, although the state could not make such laws with such views, and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries, or from other states; that she might tax them the same as other property, and might regulate the sale to some extent; that a state might pass health and police laws which would, to a certain extent, affect foreign commerce and commerce between the states; and that this statute was a regulation of that character, and constitutional.

The jury found the defendants guilty, and the court of common pleas fined them \$30, from which they prosecuted their writ of error to the superior court of judicature of New Hampshire, where the judgment was affirmed. The present writ of error is prosecuted, under the twenty-fifth section of the judiciary act of 1789, to reverse the judgment of the state court of New Hampshire, on the grounds above stated. And the question and the case presented for our consideration is, whether the state laws, and the judgment founded on them, are repugnant to the constitution of the United States. The court below having decided in favor of their validity, this is the only question that comes within our jurisdiction, although divers others were presented to and adjudged by the state court.

The importance of this case, as regards its bearing on the commerce among the states, and on the relations and rights of their citizens and inhabitants, is not to be disguised. To my mind it presents most delicate and difficult considerations. The first objection, that the statute of New Hampshire violated certain treaties with Holland, France, etc., providing for the admission of ardent spirits, has no application to the case, as the spirits sold were not foreign but American gin. The second objection relies on the first article and tenth section of the constitution, which provides that "no state shall lay any imposts or duties on imports or exports, nor any duty on tonnage," unless with the assent of congress, etc. These are negative restrictions, where the constitution operates by its own force; but as no duty or tax was imposed on the gin introduced into New Hampshire from Massachusetts, either directly or indirectly, these prohibitions on the state power do not apply. The third objection proceeds on the clause that "the congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," to which it is insisted the state statute is opposed. The power given to congress is unrestricted, and broad as the subjects to which it relates; it extends to all lawful commerce with foreign nations, and in the same terms to all lawful commerce among the states; and "among" means between two only, as well as among more than two; if it was otherwise, then an intermediate state might interdict and obstruct the transportation of imports over it to a third state, and thereby impair the general power. The article in question was introduced from one state directly into another, and the first question is: Was it a subject of lawful commerce among the states, that congress can regulate? That ardent spirits have been for ages, and now are, subjects of sale and of lawful commerce, and that of a large class, throughout a great portion of the civilized world, is not open to controversy; so our commercial treaties with foreign powers declare them to be, and so the dealing in them among the states of this Union recognizes them to be. But this condi-

tion of the subject-matter was met by the state decision on the ground, and on this only, "that the state might pass health and police laws which would, to a certain extent, affect foreign commerce and commerce between the states; and that the statute [of New Hampshire] was a regulation of that character, and constitutional."

§ 1497. *The power "to regulate commerce," etc., does not affect the police power of the states, but a state cannot exercise its police power in a manner repugnant to the power of congress "to regulate commerce," etc.*

This was the charge to the jury, and on it the verdict and judgment are founded, and which the state court of last resort affirmed. The law and the decision apply equally to foreign and to domestic spirits, as they must do on the principles assumed in support of the law. The assumption is, that the police power was not touched by the constitution, but left to the states as the constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the state, then the regulation may be made by the state, and congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this: Whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the states. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the state that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183-1201, *supra*); *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *supra*); *City of New York v. Miln*, 11 Pet., 102 (§§ 1274-83, *supra*).

What, then, is the assumption of the state court? Undoubtedly, in effect, that the state had the power to declare what should be an article of lawful commerce in the particular state; and, having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the state is attempted to be created, in a case where it did not previously exist.

If this be the true construction of the constitutional provision, then the paramount power of congress to regulate commerce is subject to a very material limitation; for it takes from congress, and leaves with the states, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the states determine what shall or shall not be regulated. Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate



to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the state and its courts could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing. And in this connection it may be proper to say, that the three states, whose laws are now before us, had in view an entire prohibition from use of spirits and wines of every description, and that their main scope and object is to enforce exclusive temperance as a policy of state, under the belief that such a policy will best subserve the interests of society; and that to this end, more than to any other, has the sovereign power of these states been exerted; for it was admitted, on the argument, that no licenses are issued, and that exclusion exists, so far as the laws can produce the result — at least in some of the states — and that this was the policy of the law. For these reasons, I think the case cannot depend on the reserved power in the state to regulate its own police. Had the gin imported been “an import” from a foreign country, then the license law prohibiting its sale by the importer would be void. The reasons for this conclusion are given in my opinion on the case of *Thurlow v. Commonwealth of Massachusetts*, 5 How., 609, and need not be repeated, and are founded on the case of *Brown v. State of Maryland*. The next inquiry is, Did it stand on the foot of “an import,” coming, as it did, from another state? If it be true, as the state courts held it was, that congress has the exclusive power to regulate commerce among the states (the states having none), and the gin introduced being an article of commerce, and the state license law being a regulation of commerce (as it was held by this court to be in the case of *Brown v. The State of Maryland*), then the state law is void, because the state had no power to act in the matter by way of regulation to any extent.

§ 1498. *The states may regulate commerce until congress acts.*

This narrows the controversy to the single point whether the states have power to regulate their own mode of commerce among the states, during the time the power of congress lies dormant, and has not been exercised in regard to such commerce. Although some regulations have been made by congress affecting the coasting trade, requiring manifests of cargoes where they exceed a certain value, to prevent smuggling, and for other purposes, still no regulation exists affecting in any degree such an import as the one under consideration. It must find protection against the state law under the constitution, or it can have none. This is also true as respects similar articles of commerce passing from state to state by land. Congress has left the states to proceed in this regard as they were proceeding when the constitution was adopted.

Is, then, the power of congress exclusive? The advocates of this construction insist that it has been settled by this court that the power to regulate commerce is exclusive, and can be exercised by congress alone. And the inquiry in advance of further discussion is: Has the construction been thus set-

tled? The principal case relied on is that of *Gibbons v. Ogden*, 9 Wheat., 1 (§§ 1183–1201, *supra*), in support of the assumption. In that case a monopoly had been granted to the inventors of machinery propelled by steam, which, when applied to vessels, forced them through the water. The law of monopoly of New York extended to the tide waters, and for navigating these with two steamboats belonging to Gibbons, a bill was filed against him, and he was enjoined by the state courts of New York; and in his answer he relied on licenses granted under the act of 18th February, 1793 (1 Stats. at Large, 305), for enrolling and licensing ships and vessels to be employed in the coasting trade, and for regulating the same. This was the sole defense. The court first held that the power to regulate commerce included the power to regulate navigation also, as an incident to, and part of, commerce.

After discussing many topics connected with, or supposed to be connected with, the subject, the power of taxation was considered by the court, and the powers to tax in the states and the United States compared with the power to regulate commerce; and in this connection the chief justice, delivering the opinion of the court, said: “But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power granted to congress, and is doing the very thing which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. In discussing the question whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations congress deemed proper to make are now in full operation. The sole question is: Can a state regulate commerce with foreign nations and among the states while congress is regulating it?” And then the court proceeds to discuss the effect of the licenses set up in Gibbons’ answer, and gives a decree of reversal, on that sole question, in his favor. The decree says: “This court is of opinion that the several licenses to the steamboats *The Stoudinger* and *The Bellona*, to carry on the coasting trade, which are set up by the appellant, Thomas Gibbons, in his answer, which were granted under an act of congress passed in pursuance of the constitution of the United States, gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the state of New York to the contrary notwithstanding.” And then the state law is declared void, as repugnant to the constitution and laws of the United States. 9 Wheat., 239. This case, then, decides that navigation was within the commercial power of the United States, and that a coasting license granted pursuant to an act of congress, in the exercise of the power, was an authority under the supreme law to navigate the public waters of New York, notwithstanding the state law granting the monopoly. This decision was made in 1824. Three years after (1827) the case of *Brown v. State of Maryland* came before the court. 12 Wheat., 419 (§§ 1466–70, *supra*).

Brown, an importing merchant, had been indicted for selling packages of dry goods in the form they were imported, without taking out a license to sell by wholesale. To this he demurred, and the demurrer was sustained, on the ground that “imports” could be sold by the importer regardless of the state law, on which the indictment was founded. Two propositions were stated by the court, and the decision of the cause proceeded on them both, and was

favorable to Brown: First, the provision of the constitution which declares that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports." And, second, that which declares congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. The first proposition has no application to the controversy before us, as here no tax or duty was imposed.

2. The court proceeds (p. 446) to inquire of the extent of the power, and says: "It is complete in itself, and acknowledges no limitations, and is co-extensive with the subject on which it operates." And for this, *Gibbons v. Ogden* is referred to, as having asserted the same postulates. The opinion then urges the necessity that congress should have power over the whole subject, and the power to protect the imported article in the hands of the importer, and proceeds to say: "We think it cannot be denied what can be the meaning of an act of congress which authorized importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser." "We think, then, that if the power to authorize a sale exists in congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable."

Two points were decided on the second proposition: 1. That a tax on the importer was a tax on the import. 2. That "an import," which had paid a tax to the United States according to the regulations of commerce made by congress, could not be taxed a second time in the hands of the importer.

Neither of these cases touch the question of exclusive power, nor do I suppose it was intended by the writer of the opinions to approach that question, as he studiously guarded the opinion in the leading case of *Gibbons v. Ogden* against such an inference, and professedly followed the doctrines there laid down in *Brown v. State of Maryland*.

The next case that came before the court was that of *Willson v. Blackbird Creek Marsh Co.*, in 1829, 2 Pet., 245 (§§ 1174-76, *supra*). The chief justice again delivered the opinion of the court, as he had done in the two previous cases. The company was authorized to make a dam across the creek under a state charter. The creek was a navigable tide water; the dam was constructed, and the licensed sloop of Willson not being enabled to pass, he broke the dam, and the company sued him for damages; to which he pleaded that the creek was a navigable highway, where the tide ebbed and flowed, and that he only did so much damage as to allow his vessel to pass. The plea was demurred to, and there was a judgment against Willson in the state court. It was insisted on his behalf in this court that the power to regulate commerce included navigation; and that navigable streams are the waters of the United States, and subject to the power of congress; and the case of *Gibbons v. Ogden* was relied on. The chief justice in the opinion said: "The counsel for the plaintiff in error insists that it comes in conflict with the powers of the United States to regulate commerce with foreign nations, and among the several states. If congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states, we should feel not much difficulty in saying that a state law, coming in conflict with such act, would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and

among the several states; a power which has not been so exercised as to affect the question. We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

Here the adjudications end. But judges, who were of the court when the three cases cited were determined, differ as to the true meaning of the chief justice in the language employed in the case of *Gibbons v. Ogden*, in illustrating the constitution in aspects supposed to bear more or less on the questions before the court; such, for instance, as that the commercial power was a unit, and covered the entire subject-matter of commerce with foreign nations and among the states; and that navigation was included in the power. In the case of *New York v. Miln*, 11 Pet., 102 (§§ 1274-83, *supra*), Mr. Justice Thompson and Mr. Justice Story differed entirely as to what the language employed in the opinion in *Gibbons v. Ogden* meant, in regard to the true exposition of the constitution; one contending that the language used had reference to the power of congress, and to a case where it had been fully exercised; the other insisting that the opinion maintained the exclusive power in congress to regulate commerce, and that the states had no authority to legislate, but were altogether excluded from interfering. This was Mr. Justice Story's opinion. I think it must be admitted that Chief Justice Marshall understood himself as Mr. Justice Thompson understood him, otherwise he could not have held as he did in the last case, in 1829, of *Willson v. Blackbird Creek Marsh Co.* And as this case was an adjudication on the precise question whether the constitution of the United States, in itself, extinguished the powers of the states to interfere with navigation on tide water, and as it was adjudged, in the case of *Gibbons v. Ogden*, that the power to regulate commerce included navigation as fully as if the clause had expressed it in terms, it is difficult to say that this case does not settle the question favorably to the exercise of jurisdiction on the part of the states, until congress shall act on the same subject and suspend the state law in its operation. But, owing to the conflicting opinions of individual judges, it is deemed proper to treat the question as though it was an open one, in the aspect that this case presents it; and then the consideration arises: Can a state, by its general laws, operating on all persons and property within its jurisdiction, regulate articles coming into the state from other states, and prohibit their sale, unless a license is obtained by the person bringing them in; and where no tax or duty is demanded of the person, or imposed on the article? In this proposition, it is not intended to involve the consideration that where congress regulates a particular commerce by general laws, as where a tax is levied on some articles on being introduced from abroad, and others permitted to come in free, that all are regulated; this I admit in the instance put, and in all others of a like character. But as no general law of congress has regulated commerce among the states, such a rule cannot apply here.

To a true understanding of the power conferred on congress to regulate commerce among the states, it may be proper briefly to refer to their condition and acts before the constitution was adopted, in this respect. The prominent evil was, that they taxed the commerce of each other directly and indirectly; and to secure themselves from undue and opposing taxes, the constitution first provides that congress shall lay no tax on articles exported from any state; second, that no state shall lay any imposts or duties on imports or exports; nor,

third, lay any duty on tonnage, without the consent of congress, except so much as may be necessary for executing its inspection laws. These are prohibitions, to which the states have conformed.

But as many general and all necessary local regulations existed when the constitution was adopted, and this, in all the states, affecting the end of commerce within their respective limits, the local regulations were continued, so far as the constitution left them in force. And they have been added to and accumulated to a great extent up to this time in the maritime states, not only as regards commerce among the states, but affecting foreign commerce also; the states, within their harbors and inland waters, have done almost everything, and congress next to nothing. So minute and complicated are the wants of commerce when it reaches its port of destination, that even the state legislatures have been incapable of providing suitable means for its regulation between ship and shore, and therefore charters granted by the state legislatures have conferred the power on city corporations. Owing to situation and climate, every port and place where commerce enters a state must have peculiarity in its regulations; and these it would be exceedingly difficult for congress to make; nor could it depute the power to corporations, as the states do. The difficulties standing in the way of congress are fast increasing with the increase of commerce and the places where it is carried on. And where it enters states through their inland borders, by land and water, the complication is not less, and especially on the large rivers. There, too, congress has the undisputed power to regulate commerce coming from state to state; but as every village would require special legislation, and constant additions as it grew and its commerce increased, to deal with the subject on the part of congress would be next to impossible in practice. I admit that this condition of things does not settle the question of contested power; but it satisfactorily shows that congress cannot do what the states have done, are doing, and must continue to do, from a controlling necessity, even should the exclusive power in congress be maintained by our decision. And this state of things was too prominently manifest for the convention to overlook it. Nor do I suppose they did so, for the following reasons.

The general rules of construction applicable to the negative and affirmative powers of grant in the constitution are commented on in the thirty-second number of the *Federalist*, in these terms: "That notwithstanding the affirmative grants of general authorities, there has been the most pointed care, in those cases where it was deemed improper that the like authorities should reside in the states, to insert negative clauses prohibiting the exercise of them by the states. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act, which justifies the position I have advanced and refutes every hypothesis to the contrary." That is, in favor of the state power. These remarks were made to quiet the fears of the people, and to clear up doubts on the meaning of the constitution, then before them for adoption by the state conventions. And it is an historical truth, never, so far as I know, denied, that these papers were received by the people of the states as the true exponents of the instrument submitted for their ratification. Proceeding on the principle of construction applicable to affirmative statutes,—that they stood together as a general rule, if there were no negative words,—and taking the doctrine laid down in the *Federalist* to be the true rule of interpretation,—that where the states were intended to be

prohibited negative words had been used,—the states continued to do what they had previously done, and were not by negation prohibited from doing; that is to say, to exercise the powers conferred on congress in arming and organizing and disciplining the militia, to pass bankrupt laws and to regulate the details of commerce within their limits, coming from other states and foreign countries.

The exercise of the powers to regulate the militia and to pass bankrupt laws has met with the approval of this court in the cases of *Houston v. Moore*, 5 Wheat., 1 (§§ 161–190, *supra*), and in *Ogden v. Saunders*, 12 Wheat., 213 (§§ 1940–2003, *infra*). As to the existence of the power in the states in these two instances there is no further controversy here or elsewhere. And in regard to the third, congress has stood by for nearly sixty years, and seen the states regulate the commerce of the whole country, more or less, at the ports of entry and at all their borders, without objection; and for this court now to decide that the power did not exist in the states, and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of state legislation on the particular subject. We would, by our decision, expunge more state laws and city corporate regulations than congress is likely to make in a century on the same subject, and on no better assumption than that congress and the state legislatures had been altogether mistaken as to their respective powers for fifty years and more. If long usage, general acquiescence and the absence of complaint can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage by the courts.

And as congress and the courts have conceded that the states may pass laws regulating the militia and on the subject of bankruptcies, and that the affirmative grants of power to congress in these instances did not deprive the states from exercising the power until congress acted, it is now too late, under existing circumstances, for this court to say that the similar affirmative power to regulate commerce with foreign nations and among the states shall be held an exclusive power in congress, as it could no more be done with consistency of interpretation than with safety to the existing state of the country. In proceeding on this moderate and, as I think, prudent and proper construction, all further difficulty will be obviated in regard to the admission of property into the states; this the states may regulate, so they do not tax; and if the states (or any one of them) abuse the power, congress can interfere at pleasure and remedy the evil, nor will the states have any right to complain. And so the courts can interfere if the states assume to exercise an excess of power or act on a subject of commerce that is regulated by congress. As already stated, it is hardly possible for congress to deal at all with the details of this complicated matter.

The case before us presents a fair illustration of the difficulty; all vendors of spirits produced in New Hampshire are compelled to be licensed before they can lawfully sell; this is not controverted, and cannot be. To hold that the state license law was void, as respects spirits coming in from other states as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequence of which would be that the dealers in New Hampshire would sell only spirits produced in other states, and that the products of New Hampshire would find an unrestrained market in the neighboring states having similar license laws to those of New Hampshire.

§ 1499. *The license law of New Hampshire was valid in the absence of legislation by congress.*

For the sake of convenience the views on which this opinion proceeds will be briefly restated. 1. It is maintained that spirits and wines are articles belonging to foreign commerce and commerce among the states, and that congress can regulate their introduction and transmission into and through the states so long as they belong to either class of such commerce, but no further. 2. That any state law whose provisions are repugnant to the existing regulations of congress (within the above limit) is void, so far as it is opposed to the legislation of congress. 3. That the police power of the states was reserved to the states, and that it is beyond the reach of congress; but that such police power extends to articles only which do not belong to foreign commerce, or to commerce among the states, at the time the police power is exercised in regard to them; and that the fact of their condition is a subject proper for judicial ascertainment. 4. That the power to regulate commerce among the states may be exercised by congress at pleasure, and the states cut off from regulating the same commerce at the same time it stands regulated by congress; but that until such regulation is made by congress, the states may exercise the power within their respective limits. 5. That the law of New Hampshire was a regulation of commerce among the states in regard to the article for selling of which the defendants were indicted and convicted; but that the state law was constitutionally passed, because of the power of the state thus to regulate; there being no regulation of congress, special or general, in existence to which the state law was repugnant.

And, for these reasons, I think the judgment of the state court should be affirmed.

THURLOW v. MASSACHUSETTS.

STATEMENT OF FACTS.— The statute of Massachusetts provides that no person shall presume to be a retailer or seller of wine, brandy, rum or other spirituous liquors in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, as is provided in this chapter, on pain of forfeiting \$20 for each offense.

The plaintiff, Thurlow, was found guilty by a jury for violating this law, on which verdict the supreme judicial court of Massachusetts pronounced judgment; and from which a writ of error was prosecuted to this court under the twenty-fifth section of the judiciary act of 1789. The bill of exceptions shows that some of the sales charged in the indictment were of foreign liquors; in regard to which, the court directed the jury that the license law applied as well to imported spirits as to domestic. It was proved that the defendant below had sold in quantities of gallons, quarts and pints. And the question submitted for our consideration is whether the state law and the judgment founded on it are repugnant to the acts of congress authorizing the importation of wines, brandies and other foreign spirits; and it is proper to remark that our jurisdiction and power to interfere involve the question merely of repugnance or no repugnance; if repugnance is found to exist, we must reverse, and if not, we must affirm. It follows that the judicial ascertainment of the fact will end the controversy.

For the plaintiff in error it is insisted that the state law and the judgment founded on it are repugnant to the acts of congress authorizing the importation of foreign wines and spirits, and to their introduction into the United States on paying a prescribed tax. That the laws of the states cannot control the re-

tail trade in such liquors; that if they can to any extent, they may prohibit their sale altogether, and by this means do that indirectly which cannot be done directly; that is to say, prohibit their introduction; that the purposes of wholesale importation being retail distribution, the two must go together; if not, the first is of no value; that importations reach our country in large masses for the sole purposes of diffusion and consumption; and unless congress has the control of distribution until the imported article reaches the consumer, the power to admit and to regulate commerce in regard to it will be worthless and little better than a barren theory, leaving us where we began in 1789. That any law, therefore, that prohibits consumption, necessarily destroys importation; and the retail process being the ordinary means to consumption, and indispensable to it, to refuse this means would wholly defeat the end congress has protected; that is to say, consumption. On the soundness of this reasoning, the result of the controversy depends.

§ 1500. *A state cannot regulate the sale of an article while it remains in the form of an import.*

To this argument we answer that, under the power to regulate foreign commerce, congress can protect every article belonging to foreign commerce, so long as it does belong to it, from the operation of a tax or a license imposed by a state law that obstructs or hinders the commerce. But the true inquiry here is, how long does the imported article so continue? The acts of congress protect "imports," and prescribe the quantity and measure in which they shall be made; the question of more or less is within the competency of congress; but how long the imported article continues to be "an import" is a different question; for so soon as it ceases to be so, then it is beyond the power conferred on congress "to regulate foreign commerce," and that power cannot afford it further protection. This is the line of jurisdiction where the powers of congress end, and where the powers of the states begin, when dealing respectively with the imported article. And such is the limit established in the case of *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466-70, *supra*). I do not mean to say that congress may not protect an import for the purposes of transmission over land, in the form it was imported, from one state to another, for the purposes of distribution and sale by the importer, as this can be done under the power to regulate commerce among the states. The question under examination is, not what congress may do, but what it has done. It has not permitted spirituous liquors to be imported in the quantities that they were sold by the plaintiff in error. And when the article passes by sale from the hands of the importer into the hands of another, either for the purposes of resale or of consumption, or is divided into smaller quantities, by breaking up the casks, packages, etc., by the importer, the article ceases to be a protected "import," according to the legislation of congress as it now stands, and therefore the liquors sold in this instance did not belong to "foreign commerce," when sold at the retail house by single gallons, quarts, etc. When thus divided and sold in the body of the state, the foreign liquors became a part of its property, and were subject to be taxed, or to be regulated by licenses, like any other property owned within the state.

But while foreign liquors, imported according to the regulations of congress, remain in the cask, bottle, etc., in the original form, then the importer may sell them in that form at the port of entry, or in any other part of the United States, nor can any state law hinder the importer from doing so; nor does it make any difference whether the imported article paid a tax on its introduc-



tion, or was admitted as a free article; until it passes from the hands of the importer, it is "an import," and belongs to regulated "foreign commerce," and is protected. It follows, from the principles stated, that the spirituous liquors sold by the defendant stood on no higher ground than domestic spirits did; and that domestic spirits are subject to the state authority as objects of taxation, or of license in restraint of their sale, is not a matter of controversy, and certainly cannot be here, under the twenty-fifth section of the judiciary act.

§ 1501. *The power to license includes the power to prohibit.*

I admit as inevitable, that, if the state has the power of restraint by licenses to any extent, she has the discretionary power to judge of its limit, and may go to the length of prohibiting sales altogether, if such be her policy; and that, if this court cannot interfere in the case before us, so neither could we interfere in the extreme case of entire exclusion, except to protect imports belonging to foreign commerce, as already defined. The reasons are obvious. We have no power to inquire into abuses (if such there be) inflicted by state authority on the inhabitants of the state, unless such abuses are repugnant to the constitution, laws or treaties of the United States.

For the reasons above set forth, I think the judgment of the state court should be affirmed. And, as the case of Joel Fletcher against the state of Rhode Island depends on the same principles, to every extent, I think it must be affirmed also.

Opinion by MR. JUSTICE DANIEL.

In the decision of the court, so far as it establishes the validity of the license laws of the states of Massachusetts, Rhode Island and New Hampshire, I entirely concur; and had the opinions of judges, in forming that decision, been limited strictly to an inquiry into the compatibility of those laws with the constitution of the United States, or with a just exercise of state power (the only inquiry, in my apprehension, regularly before the court), I should have been spared the painful duty of disagreement with my brethren. To this inquiry, however, those opinions, according to my apprehension, are by no means restricted. The majority of the judges, in fulfilment of their own convictions, have seemed to me to go beside the questions regularly before them, and, in this departure, have propounded principles and propositions, against which, whensoever they may be urged as motives for action on my part, I shall feel myself bound most earnestly to protest. It has been said that the principles here objected to have been already solemnly and fully adjudged and established, and should therefore be no longer assailed. The assertion as to the extent in which these principles have been ruled, or the solemnity with which they have been fixed and settled, may, in the first place, be justly questioned. It is believed that they have been directly adjudged in a single case only, and then under the qualification of an able dissent. See 12 Wheat., 449, the opinion of Thompson, J. But should this assertion be conceded in its greatest latitude, my reply to it must be firmly and unhesitatingly this: that in matters involving the meaning and integrity of the constitution, I never can consent that the text of that instrument shall be overlaid and smothered by the glosses of essay-writers, lecturers and commentators. Nor will I abide the decisions of judges, believed by me to be invasions of the great *lex legum*. I, too, have been sworn to observe and maintain the constitution. I possess no sovereign prerogative by which I can put my conscience into commission. I must interpret exclusively as that conscience shall dictate. Could I, in cases of minor consequence,

consent, in deference to others, to pursue a different course, I should, in instances like the present, be especially reluctant to place myself within the description of the poet: *Stat magni nominis umbra*.

§ 1502. *An article of commerce ceases to be subject to the power of congress to regulate commerce, etc., as soon as it reaches the importer's hands discharged of any duties, imposts, etc., levied thereupon by the federal government, and from that time is subject to state tax or legislation. Brown v. State of Maryland, 12 Wheat., 419, reviewed and criticised.*

The doctrines which to me appear to have been gratuitously brought into this case are those which have been promulgated in the reasoning of this court in the case of *Brown v. State of Maryland*, reported in 12 Wheat., 419 (§§ 1466–70, *supra*).—doctrines (and I speak it with all due respect) which I conceive cannot, by correct induction, be derived from the constitution, nor even from the grounds assumed for their foundation in the reasoning of the court in that case; but which, on the contrary, appear to be wholly illogical and arbitrary. The doctrines adverted to are these: That under the operation of that provision in the constitution which confers on congress the power of regulating commerce with foreign nations, etc., etc., and by the further provision which prohibits to the states the power of levying imposts or duties on imports, merchandise or property imported from abroad,—however completely its transit may have been ended, however completely it shall have passed beyond all agencies and obligations in reference to the federal government, and however absolutely, exclusively and undeniably it shall have become the property, and passed into the possession, of the citizen resident within the state, and protected both in person and property by the laws of the state,—shall never become subject to taxation, in common with other property of the same citizen, whilst it shall remain in the bale, package or form in which it shall have been imported, nor until (to use the language of the court) it shall have been “broken up and mingled with the general mass of property.”

With regard to this phrase, “broken up and mingled with the mass of property,” so often appealed to with the view to illustration, it may be worth while to remark, in passing, how often words introduced for the purpose of explanation are themselves the means of creating doubt or ambiguity! With respect to the phrase above mentioned, it may be retorted that a person may import a steam-engine, a piano, a telescope, or a horse, and many other subjects, which could not be broken up in order to be mingled with the general mass of property. If, then, this phrase is to be apprehended as signifying (and this alone seems its reasonable meaning) the appropriation of a subject imported in absolute private right and enjoyment, either positively or relatively, it surrenders the whole matter in dispute, and admits that all the property of the citizen, who is himself protected in his person and in the enjoyment of his property, is bound to contribute to the support of the government which yields this protection, whether he shall have imported that property or purchased it at home.

By the sixth article and second clause of the constitution, it is thus declared: “That this constitution, and the laws of the United States made in pursuance thereof, and treaties made under the authority of the United States, shall be the supreme law of the land.”

This provision of the constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government must be

expounded in coincidence with a perfect right in the states to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no "authority of the United States," save what is derived mediately or immediately, and regularly and legitimately, from the constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a state or of any citizen of a state. In cases of alleged conflict between a law of the United States and the constitution, or between the law of a state and the constitution or a statute of the United States, this court must pronounce upon the validity of either law with reference to the constitution; but, whether the decision of the court in such cases be itself binding, or otherwise, must depend upon its conformity with, or its warrant from, the constitution. It cannot be correctly held that a decision, merely because it be by the supreme court, is to override alike the constitution and the laws both of the states and of the United States. Let us test by these principles — believed to be irrefragable — the power over foreign commerce vested in congress by the constitution; and also the positions sought to be deduced from that grant of power by the argument in *Brown v. State of Maryland*. By article 1, section 8, clause 4, of the constitution, it is declared "that congress shall have power to regulate commerce with foreign nations, among the several states, and with the Indian tribes." 'Tis with the first of the grants in this article that we have now to deal. The commerce here spoken of is that traffic between the people of the United States and foreign nations, by which articles are procured by purchase or barter from abroad, or by which the like subjects of traffic are transmitted from the United States to foreign countries; keeping in view always the essential characteristic of this commerce as stamped upon it by the constitution, namely, that it is commerce with foreign nations, or, in other words, that it is external commerce. By this, however, is not meant that it should be external in reference to geographical or territorial lines, but in reference to the parties, and the nature of their transactions. The power to regulate this commerce may properly comprise the times and places at which, the modes and vehicles in which, and the conditions upon which, it may, as foreign commerce, be carried on; but precisely at that point of its existence, that it is changed from foreign commerce, at that point this power of regulation in the federal government must cease, the subject for the action of this power being gone. Independently of an express prohibition upon the states to lay duties on imports, this power of regulating foreign commerce may correctly imply a denial to the states of a right to interfere with existing regulations over subjects of foreign commerce; but they must be continuing, and still, in reality, subjects of foreign commerce, and such they can no longer be after that commerce, with regard to them, has terminated, and they are completely vested as property in a citizen of a state, whether he be the first, second or third proprietor; if this were otherwise, then, by the same reasoning, they would remain imports, or subjects of foreign commerce, through every possible transmission of title, because they had been once imported. Imports in a political or fiscal, as well as in common, practical acceptance, are properly commodities brought in from abroad, which either have not reached their perfect investiture or their alternate destination as property within the jurisdiction

of the state, or which still are subject to the power of the government for a fulfilment of the conditions upon which they have been admitted to entrance; as, for instance, goods on which duties are still unpaid, or which are bonded or in public warehouses. So soon as they are cleared of all control of the government which permits their introduction, and have become the complete and exclusive property of the citizen or resident, they are no longer imports in a political or fiscal, or common sense. They are like all other property of the citizen, and should be equally the subjects of domestic regulation and taxation, whether owned by an importer or his vendee, or may have been purchased by cargo, package, bale, piece or yard, or by hogsheads, casks or bottles. I can perceive no rational distinction which can be taken upon the circumstance of mere quantity, shape or bulk; or on that of the number of transmissions through which a commodity may have passed from the first proprietor, or of its remaining still with the latter. The objection that a tax upon an article in bulk (the property of a citizen) is forbidden because it is a burden on foreign commerce, whilst a similar burden is permissible on the very same bulk, or on fragments of the same article, in the hands of his vendee, it would appear difficult to reconcile with sound reasoning. Every tax is alike a burden, whether it be imposed on larger or smaller subjects, and in either mode must operate on price, and, consequently, on demand and consumption. If, then, there was any integrity in the objection urged, it should abolish all regulations of retail trade, all taxes on whatever may have been imported.

§ 1503. *State laws, to be void as in contravention of the commercial power of congress, must be in direct conflict with that power, and not merely remotely affecting foreign commerce.*

It cannot be correctly maintained that state laws, which may remotely or incidentally affect foreign commerce, are on that account to be deemed void. To render them so, they must be essentially and directly in conflict with some power clearly invested in congress by the constitution; and, I would add, with some regulation actually established by congress in virtue of that power. In the case of *Brown v. The State of Maryland*, it is said by the court that liberty to import implies unqualified liberty to sell at the place of importation. In the argument of this case, the proposition just mentioned does not, in all its amplitude, seem broad enough for counsel, who have contended that liberty to import implies, on the part of the states, a duty to encourage, if not to enforce, the consumption of foreign merchandise; arising, it is affirmed, from a further duty incumbent on the states to regard *a priori* the acts of the federal government as wisest and best, and therefore imposing an obligation on the states for co-operation with them. These very exacting propositions, it is believed, can hardly be vindicated, either by the legitimate meaning of words or any correct theory of the constitutional powers of congress. It cannot be necessary here to institute a criticism upon the words importation, sale, consumption, in order to show either their etymological or ordinary acceptation, or in order to expose the fallacy of the foregoing new and startling theory. Goods, moreover, may be imported into a country, as into a commercial *entrepot*, for reshipment to other markets, and not for consumption at all. But where importation may have been made with the direct view to sell, it does not follow, by necessary induction, that permission for the former implies permission for the latter, nor the power of granting the former the power of conferring the latter; much less that it implies the power or the obligation, on the part of the government, to command or insure a sale. Whatever might be the case under governments in

which power is either absolute or single, it is wholly otherwise under our system of confederated sovereignties. Here, the power of the general government is emphatically delegated and limited, although it is paramount so far as it has been delegated; and when we look for this power of the government in relation to this matter in the constitution, we find it the power to regulate commerce with foreign nations; it being the foreign character of that commerce alone which confers on congress any power whatsoever with respect to it. It has been urged that the importer pays a duty to the government for permission to introduce and vend his merchandise; that it would be unjust, therefore, to deprive him of the power of vending, as he never would have imported except with the expectation of selling. To this it may, in the first place, be replied, as has been remarked in the argument at the bar, that the question here is one of constitutional power; and if the federal government shall have transcended its legitimate powers, I ask, can it be right, in any view, to compensate those who may have suffered by the transgression, by authorizing unlimited reprisals upon the states? But in truth no such right as the one supposed is purchased by the importer, and no injury in any accurate sense is inflicted on him by denying to him the power demanded. He has doubtless in view the profits resulting from the sale of his commodities; but he has not purchased, and cannot purchase, from the government that which it could not insure to him, a sale independently of the laws and polity of the states. He has, under the legitimate power of the federal government to regulate foreign commerce, purchased the right to import, or introduce his merchandise; the right to come in with it in quest of a market, and nothing beyond this. The habits, the tastes, the necessities, the health, the morals and the safety of society, form the true foundation of his calculations, or of any power or right which may be conceded to him for the sale of his merchandise, and not any supposed right in the federal government, in contravention of all these, to enforce such sale.

The want of integrity in the argument under examination is further exposed, by showing that it will not cover the conclusion sought to be drawn from it. If the right of the importer to vend, and his exemption from taxation, are made to rest on the payment of duties to the federal government, on what foundation must be rested his right and his exemption in reference to articles on which duties are neither paid nor exacted? Are these to be left exclusively the subjects of state regulation and state taxation? That they must be so left is a logical and inevitable conclusion from the proposition that the right to vend flows from the payment of duties. And then this argument involves the palpable absurdity, that merchandise which the government does not so strongly favor as to admit without duty shall remain intact and sacred, whilst merchandise which is so much preferred as to be admitted freely,—nay, whose introduction is in effect invited and solicited by the federal government,—may be burdened by the states at pleasure.

§ 1504. *Mere treaty stipulations as to the admission of articles for consumption cannot override the police power of the state.*

It has been insisted that as, by treaty stipulations, articles of foreign merchandise have been admitted for consumption (and much stress is laid upon this expression) in certain specified quantities, consequently, by such stipulations forming the supreme law of the land, the free sale of these articles must be an absolute right. In what instances a treaty is or is not the supreme law, or is no law at all, I have already endeavored to distinguish. Passing, therefore, that investigation, it seems very clear that the proposition just adverted to in-

volves a great fallacy. The treaty stipulations here exemplified mean this, and nothing more, namely, that whereas certain enumerated commodities could heretofore be imported only in greater quantities, for the use of those who might choose to buy and consume them, they may hereafter be imported in lesser quantities. These stipulations no more signify that commodities shall be circulated and used free of all internal regulation, than they convey a positive mandate for their being purchased and consumed, eaten and drunk, *volens volens*, or at all events. Every state that is in any sense sovereign and independent, possesses, and must possess, the inherent power of controlling property held and owned within its jurisdiction, and in virtue and under the protection of its own laws, whether that control be exerted in taxing it, or in determining its tenure, or in directing the manner of its transmission; and this, too, irrespective of the quantities in which it is held or transferred, or the sources whence it may have been derived. Such a power differs entirely from an authority essentially extraneous in its character,—an authority limited and specific, by the very terms which confer it, restricted to action upon the progress of property on its way to complete investment under the laws of the state.

§ 1505. *State license laws for the sale of liquor are merely a regulation of internal commerce.*

The license laws of Massachusetts, Rhode Island and New Hampshire, now under review, impose no exaction on foreign commerce. They are laws simply determining the mode in which a particular commodity may be circulated within the respective jurisdictions of those states, vesting in their domestic tribunals a discretion in selecting the agents for such circulation, without discriminating between the sources whence commodities may have been derived. They do not restrict importation to any extent; they do not interfere with it, either in appearance or reality; they do not prohibit sales, either by wholesale or retail; they assert only the power of regulating the latter, but this entirely within the sphere of their peculiar authority.

These laws are, therefore, in violation neither of the constitution of the United States, nor of any law nor treaty made in pursuance or under the authority of the constitution. Viewing them in this character, my co-operation is given in maintaining them, whatever differences of opinion may exist in relation to their policy or necessity. But since, whilst extending to these laws their sanction and support, there have been advanced by others principles and opinions which to me appear to have their source not in the fountain of all legitimate power in this or any other department of the federal government, I cannot by silence seem to assent to those principles and opinions, nor put from me the obligation of declaring my dissent from them.

Opinion by MR. JUSTICE WOODBURY.

I concur in the conclusion of my brethren as to the judgment which ought to be pronounced in all of the three license cases. But, differing in some of the reasons for that judgment, and in the limitations and extent of some of the principles involved, and knowing the cases to possess much interest in the circuit to which I belong, and from which they all come, I do not feel at liberty to refrain from briefly expressing my views upon them. The paramount question involved in all the cases is, whether license laws by the states for selling spirituous liquors are constitutional. It is true that several other points are raised, as to evidence, the power of juries in criminal prosecutions to decide the law as well as the facts, and other questions not connected with the overruling

of any clause in an act of congress, or treaty, or the constitution, which was interposed in the defense. But, confined as we are to these last considerations in writs of error to state courts, it would be traveling out of our prescribed path to discuss at all either the other questions just alluded to, or some which have been long and ardently agitated in connection with this subject; such, for instance, as the expediency of the license laws, or the power of a state to regulate in any way the food and drink or clothing of its inhabitants. Fortunately those questions belong to another and more appropriate forum—the state tribunals.

But, looking to the relations which exist between the general government and the different state sovereignties, the question, whether the laws in these cases are within the power of the states to pass, without an encroachment on the authority of the general government, is one of those conflicts of laws between the two governments, involving the true extent of the powers in each as regards the other, which is very properly placed under our revision. In helping to discharge that duty on this occasion, I carry with me, as a controlling principle, the proposition that state powers, state rights and state decisions are to be upheld when the objection to them is not clear, equally proper as it may be for them, when the objection is clear, to give way to the supremacy of the authorized measures of the general government. See Constitution, art. 3.

§ 1506. *To make a state law void there must be an actual collision between it and the power vested in congress.*

It is not enough to fancy some remote or indirect repugnance to acts of congress—a “potential inconvenience”—in order to annul the laws of sovereign states, and overturn the deliberate decisions of state tribunals. There must be an actual collision, a direct inconsistency, and that deprecated case of “clashing sovereignties,” in order to demand the judicial interference of this court to reconcile them. *McCulloch v. State of Maryland*, 4 Wheat., 316, 487 (§§ 380–398, *supra*); 1 Story’s Com. on Const., 432. These cases present two leading facts in respect to the material points, which ought first to be noticed. Neither of them is a prosecution against the importer of spirit or wine from a foreign country; and in neither has a duty been imposed, or a tax collected, by the state from the original defendant in connection with these articles. From this state of things it follows that however much has been said as to the collision between these license laws and some former decisions of this court, no such direct issue is made up in either of them. The case usually cited in support of such a proposition is very different. It is that of *Brown v. State of Maryland*, 12 Wheat., 419 (§§ 1466–70, *supra*), which was a tax or license required, before the sale of an article, from the importer of it from a foreign country; and it was an importer alone who called the constitutionality of the law in question. What do these statutes then really seek to do? They merely attempt to regulate the sale of spirit or wine within the limits of states, in regard to the quantity sold at any one time without a license from the state authorities—as in the cases from Massachusetts and Rhode Island; and in regard to any sale whatever without such license—as in the case from New Hampshire.

§ 1507. *License laws for the sale of liquor relate to matters of internal commerce.*

It is true, also, that the quantity allowed to be sold in Massachusetts at any one time, without a license, is not so small as that which is permitted by congress to be imported in kegs, and in Rhode Island is greater than that which congress permits to be imported in bottles, and in New Hampshire is no quan-

tity whatever. Yet neither of the laws unconditionally prohibits importations. Indeed, neither of them says anything on the subject of importations. The first inquiry then recurs, whether they do not all stand on the same platform in respect to this, and without conflicting in this respect with any act of congress. My opinion is that they do; as none of them, by prohibiting importations, oppose in terms any act of congress which allows them, and none seem to me to conflict, in substance more than form, with entire freedom on that subject. Nor in either case do they, in point of fact, amount to a prohibition of importations in any quantity, however small. Under them, and so far as regards them, importations still go on abundantly into each of those states. It is manifest, also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without license is another, and entirely different. The first would operate on foreign commerce, on the voyage. The latter affects only the internal business of the state after the foreign importation is completed and on shore. In the next place, in point of fact, neither of the laws goes so far as to prohibit in terms the sales, any more than the imports of spirits. On looking at the laws, this will be conceded. But if such a prohibition existed as to sales, what act of congress would it come in collision with? None has ever been passed which professes to regulate or permit sales within the states as a matter of commerce. A good reason exists for this, as the subject of buying and selling within a state is one as exclusively belonging to the power of the state over its internal trade, as that to regulate foreign commerce is with the general government, under the broadest construction of that power.

And what power or measure of the general government would a prohibition of sales within a state conflict with, if it consisted merely in regulations of the police or internal commerce of the state itself? There is no contract, express or implied, in any act of congress, that the owners of property, whether importers or purchasers from them, shall sell their articles in such quantities or at such times as they please within the respective states. Nor can they expect to sell on any other or better terms than are allowed by each state to all its citizens, or in a manner different from what has comported with the policy of most of the old states, as well before as since the constitution was adopted. Any other view would not accord with the usages of the country, or the fitness of things, or the unquestioned powers of all sovereign states, and, as is admitted, even of those in this Union, to regulate both their internal commerce and general police. The idea, too, that a prohibition to sell would be tantamount to a prohibition to import, does not seem to me either logical or founded in fact. For, even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and, also, if a merchant, extensively engaged in commerce, often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another state, or abroad. This was the paramount object in the law of congress, so often cited, as to the importation of kegs of fifteen gallons of brandy, to have them in proper shape to be re-exported and carried on mules in Mexico, rather than to be sold for use here.

I should question the correctness of this objection, even were it the doctrine in *Brown v. Maryland*, though I do not regard it as the point there settled, or the substantial reason for it. See Chief Justice Parker's opinion in *State of New Hampshire v. Peirce*, in *Law Rep.* for September, 1845. That point related rather to the want of power in a state to lay a duty on imports.



§ 1508. *A prohibition of sale by a state is not a prohibition of importation of the article.*

But it is earnestly urged, that, as these acts indirectly prohibit sales, such a prohibition of sales is indirectly a prohibition of importations, and importations are certainly regulated by congress. It is necessary to scrutinize the grounds on which such circuitous reasoning and analogy rest. The sale of spirit being still permitted in all these states, as before remarked, it is first objected that it is permitted in certain quantities only, except under license, and that this restricts and lessens both the sales and imports. But the leading object of the license is to insure the sales of spirit in quantities not likely to encourage intemperance, and at places and times, and by persons, conducive to the same end. This is the case in New Hampshire, where none can be sold without license, while in the two other states, if no license is granted, the owner may sell in ten or twenty-eight gallons at a time; and in all the three states, the owner may, without license, consume what he imports, or store and re-export it for a market elsewhere. So the laws of most of the states forbid sales of property on the Sabbath. But who ever regarded that as prohibiting there entirely either their imports or sales?

It is further argued, however, that the license laws accomplish indirectly what is hostile to the policy of congress, and thus conflict with the spirit of its acts, as much as if they prohibited absolutely both importations and sales. But if effecting this at all, it must be because they tend to lessen, and are designed to lessen, the consumption of foreign spirits, and thus help to reduce the imports and sales of them. The case from New Hampshire is in this respect less open to objection than the others, the spirit there having been domestic. But as it came in coastwise from another state, it may involve a like principle in another view; and in its prohibitory character as to selling any liquor without license, the New Hampshire statute goes further than either of the others.

§ 1509. *A law which tends to diminish the consumption of foreign articles is not a regulation of foreign commerce.*

Now, can it be maintained that every law which tends to diminish the consumption of any foreign or domestic article, is unconstitutional, or violates acts of congress? For that is the essence of this point. So far from this, whatever promotes economy in the use or consumption of any articles is certainly desirable, and to be encouraged by both the state and general governments. Improvements of that kind by new inventions and labor-saving machinery are encouraged by patents and rewards. More especially is it sound policy everywhere to lessen the consumption of luxuries, and in particular those dangerous to public morals. So in respect to foreign articles, the disuse of them is promoted by both the general and state governments in several other ways, rather than treating it as unconstitutional or against the acts of congress, though the revenue as well as consumption be thereby diminished. Thus, the former orders the purchase of only domestic hemp for the navy, when it can be obtained of a suitable quality and price. Resolution, 18th February, 1843; 5 Statutes at Large, 648. And some of the states have often bestowed bounties on the growth of hemp, and of wheat, and other useful articles. An exception like this would cut so deep and wide into other usages and policy well established, as to need no further refutation. But this objection is mixed up with another,—that the operation of these license laws is unconstitutional, because they lessen the amount of revenue which the general government might otherwise derive from the importation of that which is made abroad. It may be a sufficient

reply to this, that congress itself, by its own revenue system, has at times, by very high duties on some articles, meant to diminish their consumption, and reduce the revenue which otherwise might be derived from them if allowed to be introduced more largely under a small duty. And in this very article of spirits it has confessedly, from the foundation of the government, made the duties high, so as to discourage their use; and this in the very last tariff of 1846 (9 Stats. at Large, 42), though considered to be more emphatically a mere revenue measure. So its actual policy for fifteen years has been to lessen the use of spirit in both the army and navy; and by the third section of the act of August 29, 1842, ch. 267 (5 Statutes at Large, 546), this policy is recognized and encouraged by law.

So, when resorting to internal duties, for a like reason in part, stills and the manufacture of whiskey have been the first resorted to, and at last, in order to discourage the making of molasses into New England rum, the drawback on the former, when manufactured into spirit and exported, is allowed to stand now on a footing much less favorable than that on sugar when refined and exported. Again, where states look to the most proper objects of domestic taxation, it is perfectly competent for them to assess a higher tax or excise, by way of license or direct assessment, on articles of foreign rather than domestic growth belonging to her citizens; and it ever has been done, however it may discourage the use of the former, or lessen the revenue which might otherwise be derived from them by the general government, or tend to reduce imports, as well as restrict the sale of them when considered of a dangerous character. The ground is, therefore, untenable entirely, that a course of legislation which serves to discourage what is foreign, whether it be by congress or the states, is for that reason alone contrary to the constitution, even if it tend at the same time to reduce the amount of revenue which would otherwise accrue from foreign imports, or from those of that particular article. Importations, then, being left unforbidden in all of these cases, and the right to sell with a license not being prohibited in any of them,—nor without one prohibited, except qualifiedly in two of them, and in the other absolutely, but not affecting foreign imports at all in that case, as the spirit sold there was of domestic manufacture,—I pass to the next constitutional objection.

§ 1510. *A license imposed upon the sale of liquor generally by a state, with a penalty for selling without it, is not an impost or duty on imports.*

It has been contended that the sum required to be paid for a license, and the penalty imposed for selling without one, are in the nature of a duty on imports, and thus come within the principle really settled in *Brown v. Maryland*, and thus conflict with the constitution. It is conceded that a state is forbidden "to lay any impost or duties on imports" without the assent of congress. Art. 1, § 10. But neither of these statutes purports to tax imports from abroad of foreign spirits, or imports from another state, either coastwise or by land, of either foreign or domestic spirits. The last mode is not believed to be that referred to in the constitution, and no regulation has ever been made by congress concerning it when consisting of domestic spirits, as in the case of New Hampshire, except with a view to prevent smuggling. Act of Congress, September 1, 1789, ch. 11, § 25, and February 18, 1793, ch. 8, § 14; 1 Statutes at Large, 61, 309. Nor does either of these statutes purport to tax the introduction of an article by the merchant importing it, much less to impose any duty on the article itself for revenue, in addition to what congress requires. Neither of them appears to be, in character or design, a fiscal measure. They do not

touch the merchandise till it has become a part of the property and capital of the state, and then merely regulate the disposal of it under license, as an affair of police and internal commerce. They might then even tax it as a part of the commercial stock in trade, and thus subject it, like other property, to a property tax, without being exposed to be considered an impost on imports, so as to conflict with the constitution. But the penalty and license in these cases are imposed *diverso intuitu*, and not as a tax of any kind. Hence they operate no more in substance than in form, as an impost of the prohibited character.

There is no pretense that the penalty is for revenue; and if the small sum taken for a license should ever exceed the expense and trouble of supervising the matter, and become a species of internal duty or excise, it would operate on spirit made in the state as well as that made elsewhere, and on others as well as importers, and, like any state tax on local property, or local trade, or local business, be free from any conflict with the constitution or acts of congress. And what seems decisive in these causes as to this aspect of the question is, that neither of the persons here prosecuted was in fact an importer of foreign spirit or wines, or set up a defense of that kind as to himself, on the trial, which was overruled in the state courts. Nor can the proposition, sometimes advanced, be vindicated, that this license, if a tax, and falling at times on persons not citizens, whether they belong to other states or are aliens, is either unjust or unconstitutional. It falls on them only when within the limits of the state, under the protection of its laws and seeking the privileges of its trade, and only in common with their own citizens. Such taxes are justifiable on principles of international law (Vattel, B. 8, c. 10, § 132), and I can find no clause in the constitution with which they come in collision.

§ 1511. — *and such license laws are not laws regulating foreign commerce.*

Again, it has been strenuously insisted on in these cases, and perhaps it is the leading position, that these license laws are virtually regulations of foreign commerce; and hence, when passed by a state, are exercising a power exclusively vested in the general government, and therefore void. This is maintained, whether they actually conflict with any particular act of congress or not. But dissenting from any such definition of that power, as thus exclusive and thus abrogating every measure of a state which by construction may be deemed a regulation of foreign commerce, though not at all conflicting with any existing act of congress, or with anything ever likely to be done by congress, I shall not, on this occasion, go at length into the reasons for my dissent to the exclusive character of this power, because these license laws are not, in my opinion, regulations of foreign commerce, and in a recent inquiry on the circuit, I have gone very fully into the question. *The United States v. New Bedford Bridge*, in Massachusetts district.

§ 1512. *Concurrent powers of the state and federal governments in the regulation of commerce.*

My reasons are in brief: 1. The grant is in the same article of the constitution, and in like language, with others which this court has pronounced not to be exclusive, *e. g.*, the regulation of weights and measures, of bankruptcy and disciplining the militia. 2. There is nothing in its nature, in several respects, to render it more exclusive than the other grants, but, on the contrary, much in its nature to permit and require the concurrent and auxiliary action of the states. But I admit that, so far as regards the uniformity of a regulation reaching to all the states, it must in these cases, of course, be exclusive; no state being able to prescribe rules for others as to bankruptcy, or weights and

measures, or the militia, or for foreign commerce. A want of attention to this discrimination has caused most of the difficulty. But there is much in connection with foreign commerce which is local within each state, convenient for its regulation and useful to the public, to be acted on by each till the power is abused or some course is taken by congress conflicting with it. Such are the deposit of ballast in harbors, the extension of wharves into tide water, the supervision of the anchorage of ships, the removal of obstructions, the allowance of bridges with suitable draws, and various other matters that need not be enumerated, beside the exercise of numerous police and health powers, which are also by many claimed upon different grounds.

This local, territorial and detailed legislation should vary in different states, and is better understood by each than by the general government; and hence, as the colonies under an empire usually attend to all such local legislation within their limits, leaving only general outlines and rules to the parent country at home, as towns, cities and corporations do it through by-laws for themselves, after the state legislature lays down general principles, and as the war and navy departments and courts of justice make detailed rules under general laws, so here the states, not conflicting with any uniform and general regulations by congress as to foreign commerce, must for convenience, if not necessity, from the very nature of the power, not be debarred from any legislation of a local and detailed character on matters connected with that commerce omitted by congress. And to hold the power of congress as to such topics exclusive, in every respect, and prohibitory to the states, though never exercised by congress, as fully as when in active operation, which is the opposite theory, would create infinite inconvenience, and detract much from the cordial co-operation and consequent harmony between both governments, in their appropriate spheres. It would nullify numerous useful laws and regulations in all the Atlantic and commercial states in the Union. If this view of the subject conflicts with opinions laid down *obiter* in some of the decisions made by this court (9 Wheat., 20; 12 id., 438; 16 Pet., 543), it corresponds with the conclusions of several judges on this point, and does not, in my understanding of the subject, contradict any adjudged case in point. 5 Wheat., 49; Willson v. Blackbird Creek Marsh Co., 2 Pet., 245 (§§ 1174-76, *supra*); 11 id., 132; 14 id., 579; 16 id., 627, 664; 4 Wheat., 196.

§ 1513. *The license laws in question do not operate as regulations of foreign commerce.*

But without going further into this question, it is enough here to say that these license laws do not profess to be, nor do they operate as, regulations of foreign commerce. They neither direct how it shall be carried on, nor where, nor under what duties or penalties. Nothing is touched by them which is on shipboard, or between ship and shore; nothing till within the limits of a state, and out of the possession and jurisdiction of the general government.

§ 1514. — *nor are they regulations of commerce among the states.*

It is objected, in another view, that such licenses for selling domestic spirit may affect the commerce in it between the states, which by the constitution is placed under the regulation of congress as much as foreign commerce. But this license is a regulation neither of domestic commerce between the states, nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the state and become component parts of its property. Then it has by the constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents,

citizens or not, by its regulations, if they ask its protection and privileges; and congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the states can interfere in regulation of foreign commerce. If the proposition was maintainable that, without any legislation by congress as to the trade between the states (except that in coasting, as before explained, to prevent smuggling), anything imported from another state, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a state, then it is obvious that the whole license system may be evaded and nullified, either from abroad or from a neighboring state. And the more especially can it be done from the latter, as imports may be made in bottles of any size, down to half a pint, of spirits or wines; and if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity.

The apprehension that the states, by these license systems, are likely to impair the freedom of trade between each other, is hardly verified by the experience of a half century. Their conduct has been so liberal and just thus far on this matter, as never to have called for the legislation of congress, which it clearly has the power to make in respect to the commerce between the states, whenever any occasion shall require its interposition to check imprudences or abuses on the part of any one of them towards the citizens of another.

§ 1515. — *nor do they violate our foreign treaties.*

Some have objected, next, that these laws violate our foreign treaties, such as those, for example, with Great Britain and Prussia, which stipulate for free ingress and egress as to our ports, as well as for a participation in our interior trade. See 8 Stats. at Large, 116, 228, 378. But those arrangements do not profess to exempt their people from local taxation here, or local conformity to license systems, operating, as these state laws do, on their own citizens and their own domestic products in the same way, and to the same extent, as on foreign ones. And neither of those laws in this case forbid access to our ports, or importation into the several states, by the inhabitants of any foreign countries.

In settling the question whether these laws impugn treaties, or regulate either foreign commerce or that between the states, or impose a duty on imports, ordinary justice to the states demands that they be presumed to have meant what they profess till the contrary is shown. Hence, as these laws were passed by states possessing experience, intelligence and a high tone of morals, it is neither legal nor liberal to attempt to nullify them by any forced construction, so as to make them regulations of foreign commerce, or measures to collect revenue by a duty on foreign imports, thus imparting to them a character different from that professed by their authors, or from that which, by their provisions and tendency, they appear designed for. These states are as incapable of duplicity or fraud in their laws, of meaning one thing and professing another, as the purest among their accusers; and while legitimate and constitutional objects are assigned, and means used which seem adapted to such ends, it is illiberal to impute other designs, and to construe their legislation as of a sinister character, which they never contemplated. Thus, on the face of them, these laws relate exclusively to the regulation of licensed houses and the sales of an article which, especially where retailed in small quantities, is likely to attract together within the state unusual numbers, and encourage idleness, wastefulness and drunkenness. To mitigate, if not prevent, this last evil, was undoubtedly their real design.

From the first settlement of this country, and in most other nations, ancient or modern, civilized or savage, it has been found useful to discountenance excesses in the use of intoxicating liquor. And without entering here into the question whether legislation may not, on this as other matters, become at times intemperate, and react injuriously to the salutary objects sought to be promoted, it is enough to say, under the general aspect of it, that the legislation here is neither novel nor extraordinary, nor apparently designed to promote other objects than physical, social and moral improvement. On the contrary, its tendency clearly is to reduce family expenditures, secure health, lessen pauperism and crime, and co-operate with, rather than counteract, the apparent policy of the general government itself in respect to the disuse of ardent spirit. They aim, then, at a right object. They are calculated to promote it. They are adapted to no other. And no other, or sinister, or improper view can, therefore, either with delicacy or truth, be imputed to them.

§ 1516. *A state in the exercise of its police power may partially or wholly prohibit within its limits the sale of any article dangerous to the public health or morals of its inhabitants.*

But I go further on this point than some of the court, and wish to meet the case in front, and in its worst bearings. If, as in the view of some, these license laws were really in the nature of partial or entire prohibitions to sell certain articles within the limits of a state, as being dangerous to public health and morals, or were virtual taxes on them as state property in a fair ratio with other taxation, it does not seem to me that their conflict with the constitution would, by any means, be clear. Taking for granted, till the contrary appears, that the real design in passing them for such purposes is the avowed one, and especially while their provisions are suited to effect the professed object, and nothing beyond that, and do not apply to persons or things, except where within the limits of state territory, they would appear entirely defensible as a matter of right, though prohibiting sales.

Whether such laws of the states as to licenses are to be classed as police measures, or as regulations of their internal commerce, or as taxation merely, imposed on local property and local business, and are to be justified by each or by all of them together, is of little consequence, if they are laws which from their nature and object must belong to all sovereign states. Call them by whatever name, if they are necessary to the well-being and independence of all communities, they remain among the reserved rights of the states, no express grant of them to the general government having been either proper, or apparently embraced in the constitution. So, whether they conflict or not indirectly and slightly with some regulations of foreign commerce, after the subject-matter of that commerce touches the soil or waters within the limits of a state, is not, perhaps, very material, if they do not really relate to that commerce, or any other topic within the jurisdiction of the general government.

As a general rule, the power of a state over all matters not granted away must be as full in the bays, ports and harbors within her territory, *intra fauces terræ*, as on her wharves and shores, or interior soil. And there can be little check on such legislation, beyond the discretion of each state, if we consider the great conservative reserved powers of the states, in their quarantine or health systems, in the regulation of their internal commerce, in their authority over taxation, and, in short, every local measure necessary to protect themselves against persons or things dangerous to their peace and their morals.

It is conceded that the states may exclude pestilence, either to the body or

mind, shut out the plague or cholera, and, no less, obscene paintings, lottery tickets and convicts. *Holmes v. Jennison*, 14 Pet., 568; 9 Wheat., 203; 11 Pet., 133. How can they be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when and where it shall be conducted in articles intimately connected either with public morals, or public safety, or the public prosperity. See *Vattel*, B. 1, c. 19, §§ 219, 231.

The list of interdicted articles and persons is a long one in most European governments, and though in some cases not very judicious or liberal, is in others most commendable; and the exclusion of opium from China is an instance well known in Asia, and kindred in its policy. The introduction and storage of gunpowder in large quantities is one of those articles long regulated and forbidden here. *New York v. Miln*, 11 Pet., 102 (§§ 1274-83, *supra*). Lottery tickets and indecent prints are also a common subject of prohibition almost everywhere. 6 Greenleaf, 412; 4 Blackford, 107. See the tariff of 1842; 5 Stats. at Large, 566, § 28. And why not cards, dice and other instruments for gaming, when thought necessary to suppress that vice? In short, on what principle but this rests the justification of the states to prohibit gaming itself, wagers, champerty, forestalling,—not to speak of the debatable cases of usury, marriage brokerage bonds, and many other matters deemed either impolitic or criminal?

It might not comport with the usages or laws of nations to impose mere transit duties on articles or men passing through a state, and however resorted to in some places and on some occasions, it is usually illiberal as well as injudicious. *Vattel*, B. 8, c. 10. And if resorted to here, in respect to the business or imports of citizens of other states, might clearly conflict with some provisions of the constitution conferring on them equal rights, and be a regulation of the commerce between the states, the power over which they have expressly granted to the general government. But the present case is not of that character. Nor would it be, if prohibiting sales within the acknowledged limits of a state, in cases affecting public morals or public health. Nor is there in this case any complaint, either by a foreign merchant or foreign nation, that treaties are broken; or by any of our own states or by congress, that its acts or the constitution have been violated.

There are additional illustrations of such powers, existing on general principles in all independent states, given in *Puffendorf*, B. 8, c. 5, § 30, as well as in various other writers on national law. And those exercised under what he terms "sovereign or transcendental propriety" (§ 7), and those which we class under the right of "eminent domain," are recognized in the fifth amendment to the constitution itself, and go far beyond this. Much more is there an authority to forbid sales, where an authority exists both to seize and destroy the article itself, as is often the case at quarantine. So the power to forbid the sale of things is surely as extensive, and rests on as broad principles of public security and sound morals, as that to exclude persons. And yet who does not know that slaves have been prohibited admittance by many of our states, whether coming from their neighbors or abroad? And which of them cannot forbid their soil from being polluted by incendiaries and felons from any quarter?

§ 1517. *The federal government has no power to control the internal commerce or police of the states.*

Nor is there, in my view, any power conferred on the general government, which has a right to control this matter of internal commerce or police, while

it is fairly exercised so as to accomplish a legitimate object, and by means adapted legally and suitably to such end alone. New Hampshire has, for many years, made it penal to bring into her limits paupers even from other states; and this is believed to be a power exercised widely in Europe among independent nations, as well as in this country among the states. New Hampshire Rev. Stat., Paupers, 140. It is the undoubted and reserved power of every state here, as a political body, to decide, independent of any provisions made by congress, though subject not to conflict with any of them when right-ful, who shall compose its population, who become its residents, who its citizens, who enjoy the privileges of its laws, and be entitled to their protection and favor, and what kind of property and business it will tolerate and protect. And no one government, or its agents or navigators, possess any right to make another state, against its consent, a penitentiary, or hospital, or poor-house farm, for its wretched outcasts, or a receptacle for its poisons to health, and instruments of gambling and debauchery. Indeed, this court has deliberately said: "We entertain no doubt whatsoever, that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds and paupers." *Prigg v. Pennsylvania*, 16 Pet., 625.

There may be some doubt whether the general government or each state possesses the prohibitory power, as to persons or property of certain kinds, from coming into the limits of the state. But it must exist somewhere; and it seems to me rather a police power, belonging to the states, and to be exercised in the manner best suited to the tastes and institutions of each, than one anywhere granted or proper to the peculiar duties of the general government. Or, if vested in the latter at all, it is but concurrent. Hence, when the latter prohibited the import of obscene prints, in the tariff of 1842, it was a novelty, and was considered by some more properly to be left to the states, as it opened the door to a prohibition, or to prohibitory duties, to many articles by the general government which some states might desire, but others not wish to come in as competitors to their own manufactures. But, as previously shown, to prohibit sales is not the same power, nominally or in substance, as to prohibit imports.

It is possible, that, under our system of double governments over one and the same people, the states cannot prohibit the mere arrival of vessels and cargoes which they may deem dangerous in character to their public peace, or public morals, or general health. This might, perhaps, trench on foreign commerce. Nor can they tax them as imports. This might trench on that part of the constitution which forbids states to lay duties on imports. But after articles have come within the territorial limits of states, whether on land or water, the destruction itself of what contains disease and death, and the longer continuance of such articles within their limits, or the terms and conditions of their continuance, when conflicting with their legitimate police, or with their power over internal commerce, or with their right of taxation over all persons and property under their protection and jurisdiction, seems one of the first principles of state sovereignty, and indispensable to public safety. Such extraordinary powers, I concede, are to be exercised with caution, and only when necessary or clearly justifiable in emergencies, on sound and constitutional principles; and, if used too often, or indiscreetly, would open a door to much abuse. But the powers seem clearly to exist in the states and ought to remain



there; and though, in this instance, they are not used to this extent, but still, as respectable minorities within these three states, believe not to be useful, and as some other states do not think deserving imitation, yet they are used as the competent and constitutional power within each has judged to be proper for its own welfare, and as does not appear to be repugnant to any part of the constitution, or a treaty or an act of congress. They must, therefore, not be interfered with by this court, and the more especially, as one reason why these powers have been left with the states is, that the subject-matter of them is better understood by each state than by the Union; and the policy and opinions and usages of one state in relation to some of them may be very unlike those of others, and therefore require a different system of legislation. Where can such a power also be safer lodged than with those public bodies or states who are themselves to be the greatest sufferers in interest and character by an improper use of it? If it should happen at any time to be exercised injudiciously, that circumstance would furnish a ground for an appeal rather to the intelligence and prudence of the state, in respect to its modification or repeal, than an authority for this court, by a writ of error, to interfere with the well-considered decision of a state court, and reverse it, and pronounce a state law null and void merely on that account.

Many state laws are such that their expediency and justice may be doubted widely, and by this tribunal; but this confers no authority on us to nullify them; nor is any such authority, for such a cause, conferred on congress by any part of the constitution. The states stand properly on their reserved rights, within their own powers and sovereignty, to judge of the expediency and wisdom of their own laws; and while they take care not to violate clearly any portion of the constitution or statutes of the general government, our duty to that constitution and laws, and our respect for state rights, must require us not to interfere.

Opinion by MR. JUSTICE GRIER.

I concur with my brethren in affirming the judgment in this and the preceding cases on the same subject, but for reasons differing somewhat from those expressed by the other members of the court; and as I concurred mainly with the opinion delivered by Mr. Justice M'Lean in the case of *Thurlow v. Massachusetts*, 5 How., 586, I had concluded to be silent, and therefore am not prepared to express my views at length. I take this occasion, however, to remark that the true question presented by these cases, and one which I am not disposed to evade, is, whether the states have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism and crime. I do not consider the question of the exclusiveness of the power of congress to regulate commerce as necessarily connected with the decision of this point.

§ 1518. *The states have power to regulate respectively their internal police; and laws regulating the sale of liquor within its limits may be passed by a state in the exercise of its police power, and are constitutional and valid.*

It has been frequently decided by this court "that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the states or restrained by the constitution of the United States; and that consequently, in relation to these, the authority of a state is complete, unqualified and conclusive." Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed

that every law for the restraint and punishment of crime, for the preservation of the public peace, health and morals, must come within this category. As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance which relate only to property, convenience or luxury, to recede, when they come in conflict or collision, *salus populi suprema lex*. If the right to control these subjects be "complete, unqualified and exclusive" in the state legislatures, no regulations of secondary importance can supersede or restrain their operations on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others. It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers; they operate on the ship, which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned and punished for their offenses against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power which the states assume, to regulate commerce or to interfere with the regulations of congress, but because police laws for the preservation of health, prevention of crime and protection of the public welfare, must of necessity have full and free operation, according to the exigency which requires their interference.

It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power or of legislation as between the states and the United States. Each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousandfold in health, wealth and happiness of the people.

MR. JUSTICE NELSON concurred in the opinions by TANEX, C. J., and MR. JUSTICE CATRON.

NEILSON v. GARZA.

(Circuit Court for Texas: 2 Woods, 287-293. 1876.)

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—The complainant in this case resides in Matamoras, Mexico, and is largely engaged in the business of importing hides from that city to Brownsville, in Texas, and sending the same thence via the port of Brazos Santiago, in Texas, to New York.

The defendant is inspector of hides and animals for Cameron county, Texas, at Brownsville, appointed and acting under an act of the legislature of Texas, approved October 14, 1871, and a further act, approved March 23, 1874, entitled for "the encouragement of stock raising and the protection of stock raisers." By virtue of his said office, the defendant claims and exercises the

right to inspect the hides imported as aforesaid by the complainant, and to exact and receive, and does exact and receive therefor, in accordance with said law, fees at the rate of from six to ten cents per hide, according to the number inspected. The complainant contends that this exaction is in reality an impost or duty on the importation or exportation of said hides, and that it is contrary to those clauses of the constitution of the United States which declare that congress shall have power "to regulate commerce with foreign nations and among the several states;" and that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." It is not pretended that congress has granted any consent in the case; and the complainant insists that congress, in making the importation of hides free from duty, has regulated the subject, and no state regulation can have any force or effect, but all such regulations are void.

§ 1519. *The right to make inspection laws is among the rights reserved to the states, but the imposition of a duty under color of inspection is void.*

If the state law of Texas, which is complained of, is really an inspection law, it is valid and binding unless it interferes with the power of congress to regulate commerce, and if it does thus interfere, it may still be valid and binding until revised and altered by congress. The right to make inspection laws is not granted to congress, but is reserved to the states; but it is subject to the paramount right of congress to regulate commerce with foreign nations, and among the several states; and if any state, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws.

§ 1520. *Inspection laws being subject to the revision of congress, it has the power to decide whether the charge is really a duty or impost or a reasonable inspection fee.*

How the question, whether a duty is excessive or not, is to be decided, may be doubtful. As that question is passed upon by the state legislature, when the duty is imposed, it would hardly be seemly to submit it to the consideration of a jury in every case that arises. This might give rise to great diversity of judgment, the result of which would be to make the law constitutional one day, and in one case, and unconstitutional another day, in another case. As the article of the constitution which prescribes the limit goes on to provide that "all such laws shall be subject to the revision and control of congress," it seems to me that congress is the proper tribunal to decide the question whether a charge or duty is or is not excessive. If, therefore, the fee allowed in this case by the state law is to be regarded as in effect an impost or duty on imports or exports, still if the law is really an inspection law, the duty must stand until congress shall see fit to alter it. Then we are brought back to the question whether the law is really an inspection law. If it is, we cannot interfere with it on account of supposed excessiveness of fees. If it is not, the exaction is clearly unconstitutional and void, being an unauthorized interference with the free importation of goods. The complainant contends that it is not an inspection law; that inspection laws only apply legitimately to the domestic products of the country, intended for exportation; and that no inspection is actually required in this particular case, but a mere examination to see if the hides are marked, and who imported them, etc., duties which belong to the entry of goods, and not their inspection.

§ 1521. *Inspection laws apply as well to goods imported as to those to be exported.*

No doubt the primary and most usual object of inspection is to prepare goods for exportation in order to preserve the credit of our exports in foreign markets. Chief Justice Marshall, in *Gibbons v. Ogden*, says: "The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or, it may be, for domestic use." 9 Wheat., 203 (§§ 1183-1201, *supra*); Story on the Const., sec. 1017. But in *Brown v. State of Maryland*, he adds, speaking of the time when inspection takes place: "Inspection laws, so far as they act upon articles for exportation, are generally executed on land before the article is put on board a vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection is a tax which is frequently, if not always, paid for service performed on land." 12 Wheat., 419 (§§ 1466-70, *supra*); Story on the Const., sec. 1017. So that, according to Chief Justice Marshall, imported as well as exported goods may be subject to inspection; and they may be inspected as well to fit them for domestic use as for exportation. All house-keepers who are consumers of flour know what a protection it is to be able to rely on the inspection mark for a fine or superior article.

Bouvier defines inspection as the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. Law Dict., *verb.* Inspection. The removal or destruction of unsound articles is undoubtedly, says Chief Justice Marshall, an exercise of that power. *Brown v. Maryland*, *supra*; Story on the Const., sec. 1024. "The object of the inspection laws," says Justice Sutherland, "is to protect the community, so far as they apply to domestic sales, from frauds and impositions; and in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets." *Clintsmen v. Northrop*, 8 Cow., 46. It thus appears that the scope of inspection laws is very large, and is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported, and to those intended for domestic use as well.

An examination of some of the actual inspection laws of the different states shows that this is the fact: Thus, in Alabama, the city authorities of Mobile are authorized to appoint inspectors, and to adopt regulations (to be approved by the governor) for the inspection of staves, tobacco, pitch, tar, turpentine, rosin, fish, flour and oil, within the limits of the city. Many of these articles must be articles of import. In Massachusetts, fish intended for exportation are to be inspected, whether inspected previously in another state or not. *Pearson v. Purkett*, 15 Pick., 264. In Kentucky, under the inspection laws of that state, imported salt cannot be sold in the state until it has been inspected, and three cents inspection fees are chargeable for each barrel inspected. The inspection laws of North Carolina are very full, and, amongst other things, provisions and forage imported from out of the state, such as beef, pork, fish, flour, butter in firkins, cheese in boxes, hay or fodder, bacon in hogsheads, etc., must be inspected before they can be sold, on pain of \$100 penalty, and a scale of inspection fees is fixed by law. It is true the constitutionality of these laws has not been tested, but they show what range inspection laws have taken, and what is generally regarded as within their scope.

§ 1522. *The law of Texas of October 14, 1871, is really an inspection law, and constitutional.*

Now, the law in question is a general law of the state of Texas; it purports

to be an inspection law, to encourage stock raising and to protect stock raisers; it makes each county of the state, except certain counties named, an inspector's district, for the inspection of hides and animals; and creates the office of inspector, to be elected by the voters of the county; it requires of him a bond and oath of office; it requires him to keep a book of records of his inspections; it requires him to examine and inspect all hides or animals known or reported to him as sold, or as leaving or going out of the county for sale or shipment; and all animals driven or sold in his district for slaughter to packeries or butcheries; it directs the method of inspecting, branding and recording animals and hides; it requires him to prevent the sale or removal out of the county of hides or animals upon which the brands cannot be ascertained, unless identified by proof, etc.; it gives him power to seize and condemn unbranded animals or hides. Various other regulations are imposed in the act. By the sixteenth section, it is provided that any person may ship from any part of the state any hides or animals imported into the state from Mexico, and shall not be required to have the same inspected: *provided*, he has first obtained the certificate of the inspector or deputy inspector of the county into which the same were imported, certifying the date of the importation thereof, the name of the importer and of the owner, and of the person in charge of the same, the name of the place where the same were imported, together with the number of hides and animals so imported, and a description of their marks and brands (if any there be) by which the same may be identified. By the seventeenth section, it is declared that inspectors shall be allowed to charge and collect the same fees for the services which they are authorized to perform by the terms of section 16 as are allowed in other cases thereafter provided.

The fees referred to are those allowed for inspection, which are, as before stated, from six to ten cents per hide, according to the number inspected. Now, it is contended that the examination and certificate required by the sixteenth section, in order to be allowed to export out of the state hides imported from Mexico, is not an inspection, but is expressly denominated otherwise. "Shall not be required to have the same inspected," are the words, it is true. But the thing which is required, though not such an inspection as is usual and customary in other cases, is, nevertheless, an actual inspection. The exporter must obtain the certificate of the inspector, or his deputy, of the county into which the hides were imported, certifying (note what things are to be certified) the date of the importation, the name of the importer and of the owner, and of the person in charge, name of the place where imported, number of hides and animals imported, and description of their marks and brands, if any there be, by which they can be identified. What is this but inspection? The object is to subject the hides or animals to the examination of the official inspector, that he may note everything about them, serving to their identification, ownership, etc. I do not say that such an inspection as this is necessary or expedient, but it is inspection, and at such a place as Brownsville, it may, for aught I know, be a necessary police regulation to prevent frauds and clandestine removal and exportation of property belonging to the people of Texas. The fee or duty exacted may be excessive, but if so, congress can regulate that. Our only concern with the case is to know whether the acts required by the state law, and performed by the defendant on and about the hides, are fairly characterized as inspection or not. If they are, that ends the case here. We think the law is an inspection law; that the part of it in question is not foreign to that character, and that the acts of the defendant for which the fees exacted

by him were charged, were fairly performed under said inspection law, and that the fees are valid charges, until they shall be altered by congress.

The bill is therefore dismissed, with costs.

PEOPLE v. COMPAGNIE GENERALE TRANSATLANTIQUE.

(Circuit Court for New York: 10 Federal Reporter, 357-364. 1882.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—This suit was commenced in the court of common pleas for the city and county of New York, and was removed into this court. The complaint was put in in the state court. It alleges that the defendant is and was, at the times thereafter mentioned, a corporation formed under the laws of France, and owner of the vessels thereafter named; that the defendant, by vessels from a foreign port, brought to the port of New York alien passengers, for whom a tax has not heretofore been paid by the vessels, on the dates, from the ports, and to the number, stated in the complaint, being in June, July and August, 1881, by nine vessels on sixteen voyages, all from Havre or Marseilles, the number of alien passengers being, in all, six thousand two hundred and fourteen; that the master, owner, agent and consignees of such vessels, each and all, failed and neglected to pay, or cause to be paid, to the chamberlain of the city of New York, within twenty-four hours after the arrival of each of said vessels at the port of New York, or at any time, the sum of \$1 for each and every one of said passengers so brought, as aforesaid, nor has any part thereof been paid; and that there is due to the plaintiffs from the defendant, by reason of the premises, the sum of \$7,767.50, debt and penalty, and interest thereon from the day after the entry of each vessel at the port of New York, for the tax and penalty imposed by law, respectively, for which sum, with interest, the plaintiffs demand judgment, with costs. The defendant has put in, in this court, a demurrer to the complaint, which states, as a ground of demurrer, that it does not state facts sufficient to constitute a cause of action. The parties, by their attorneys, have stipulated in writing that this action "is brought and prosecuted under and pursuant to an act of the legislature of the state of New York passed May 31, 1881, and known as chapter 432 of the laws of 1881;" and that the demurrer is based upon the claim that the said act "is repugnant to various provisions of the constitution of the United States (particularly article 1, section 8, and subdivision 2 of section 10), and also to the Revised Statutes of the United States, and also to the provisions of the treaties now existing between the United States and France, and other countries." The stipulation states that its intent is "to remove any question as to the right of the defendant to present and argue all such questions with the same force and effect as if the demurrer assigned various causes, separately setting up each and every objection that may be based upon the constitution of the United States or of the state of New York, or upon any existing treaties with foreign powers, or upon any alleged want of power on the part of the state to enact such a statute as that now sought to be enforced, or of the plaintiffs to bring and maintain this action."

§ 1523. *The act of the New York legislature of May 31, 1881, imposing a tax of one dollar each on alien passengers, is a regulation of commerce, and is unconstitutional and void.*

The act of May 31, 1881 (Laws of N. Y., 1881, ch. 432, p. 590), is as follows:  
"Section 1. There shall be levied and collected a duty of \$1 for each and

every alien passenger who shall come by vessel from a foreign port to the port of New York, for whom a tax has not heretofore been paid, the same to be paid to the chamberlain of the city of New York by the master, owner, agent or consignee of every such vessel within twenty-four hours after the entry thereof into the port of New York. Sec. 2. It shall be the duty of the master or acting master of every such vessel, within twenty-four hours after its arrival at the port of New York, to report, under oath, to the mayor of the city of New York, the names, ages, sex, place of birth and citizenship of each and every passenger on such vessel, and, in default of such report, every passenger shall be presumed to be an alien arriving at the port of New York for the first time. And in default of every such payment to the chamberlain of the city of New York there shall be levied and collected of the master, owner, agent or consignee of every such vessel a penalty of twenty-five cents for each and every alien passenger. Sec. 3. It shall be the duty of the chamberlain of the city of New York to pay over, from time to time, to the commissioners of emigration all such sums of money as may be necessary for the execution of the inspection laws of the state of New York with the execution of which the commissioners of emigration now are or may hereafter be charged by law, and to take the vouchers of the commissioners of emigration for all such payments. And it shall be the duty of the said chamberlain to pay over annually, on the 1st of January in each year, to the treasury of the United States, the net produce of all duties collected and received by him under this act, after the payments to the commissioners of emigration aforesaid, and take the receipt of the secretary of the treasury therefor. Sec. 4. The commissioners of emigration shall institute suits in the name of the people of the state of New York for the collection of all moneys due, or which may grow due, under this act; the same to be paid, when collected, to the chamberlain of the city of New York, to be applied by him pursuant to the terms of this act. Sec. 5. Section 1 shall not apply to any passenger whose passage ticket was actually issued and paid for prior to the time this act takes effect; but every ticket shall be presumed to have been issued after this act takes effect, in the absence of evidence showing the contrary. Sec. 6. This act shall take effect immediately."

Three days prior to the passage of the said act, and on the 28th of May, 1881 (Laws of New York, 1881, ch. 427, p. 585), an act was passed as follows:

"Section 1. The commissioners of emigration are hereby empowered and directed to inspect the persons and effects of all persons arriving by vessel at the port of New York from any foreign country, as far as may be necessary to ascertain who among them are habitual criminals or paupers, lunatics, idiots or imbeciles, or deaf, dumb, blind, infirm, or orphan persons, without means or capacity to support themselves, and subject to become a public charge, and whether their persons or effects are infected with any infectious or contagious disease, and whether their effects contain any criminal implements or contrivances. Sec. 2. On discovering any such objectionable persons or effects, the said the commissioners of emigration and its inspectors are further empowered to take such persons into their care or custody, and to detain or destroy such effects, if necessary for the public welfare, and keep such persons under proper treatment, and provide for their transportation and support as long as they may be a necessary public charge. The commissioners of emigration shall, in case of habitual criminals, and may in other cases, where necessary to prevent such persons from continuing a public charge, retransport such person or persons to the foreign port from which they came. Sec. 3. The commissioners of

emigration are further empowered to board any incoming vessel from foreign ports arriving at the port of New York, by its agents and inspectors, who shall have such powers as may be necessary to the effectual execution of this act, and any person who shall resist them in the execution of their lawful functions shall be guilty of a misdemeanor, and may be arrested by the officer resisted, and, upon conviction, may be sentenced to a term not exceeding six months in the penitentiary, or to pay a fine of \$100, or both. Sec. 4. This act shall take effect immediately."

These provisions were enacted with an endeavor to avoid the grounds on which former legislation had been held void as repugnant to the constitution of the United States. The provisions of part 1, ch. 4, tit. 4, of the Revised Statutes of New York, which authorized the recovery from the master of every vessel arriving in the port of New York from a foreign port of a sum of money for each passenger, and appropriated the money to the use of the marine hospital, were held void in the Passenger Cases, 7 How., 283 (§§ 1284-1335, *supra*), in January, 1849. After that various amendments of the law were made, which came before the supreme court in *Henderson v. Mayor of New York*, 92 U. S., 259 (§§ 1336-42, *supra*), in 1875, and were held void. This legislation required a bond for each passenger landed by a vessel from a foreign port to indemnify the commissioners of emigration and every municipality in the state against any expense for the relief or support of the passenger for four years, but the owner or consignee of the vessel could commute for the bond, and be released from giving it, by paying \$1.50 for each passenger within twenty-four hours after landing him. If the bond was not given, nor the sum paid within twenty-four hours, a penalty of \$500 for each passenger was incurred, which was made a lien on the vessel, collectible by attachment at the suit of the commissioners of emigration. The statute applied to every passenger, and not merely to every alien passenger. It applied to every passenger by a vessel from a foreign port landed at the port of New York. The court held that the statute amounted to a requirement of the payment of the \$1.50; that it was, in its purpose and effect, a law imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries; that, in taxing every passenger, it taxed a citizen of France landing from an English vessel for the support of English paupers landing at the same time from the same vessel; that a law prescribing the terms on which vessels shall engage in transporting passengers from European ports to ports in the United States is a regulation of commerce with foreign nations; that congress alone could regulate such commerce; and that a state could not, under any power supposed to belong to it, and called police power, enact such legislation as that under consideration. The court expressly reserved the question as to how far, in the absence of legislation by congress, a state could, by appropriate legislation, protect itself against *actual* paupers, vagrants, criminals and diseased persons arriving in its territory from foreign countries. A provision of the legislation of New York, then under consideration, concerned persons who should, on inspection, be found to belong to those classes, but the court acted on and held void that part of the statute which applied to all passengers alike, and that part alone.

The act of May 31, 1881, differs from the prior statute only in levying a duty of \$1 for each alien passenger, instead of \$1.50 for each passenger; and it may, perhaps, be limited to an alien who arrives for the first time. But it applies to such aliens who come as travelers for pleasure, and have means, and intend to



go back, and to such aliens who come intending to remain, and have means, as well as to such aliens who are of the classes mentioned in section 1 of the act of May 28, 1881. It compels the owner of the vessel to pay \$1 for each of the alien passengers embraced in it for the privilege of landing him. The tax is expressly imposed for having the passenger come by the vessel from a foreign port to the port of New York. The new statute is as liable to the objection stated by the court in the Henderson Case as was the statute in that case.

§ 1524. *Inspection laws relate only to merchandise, not to persons.*

But it is contended that the provisions of section 3 of the act of May 31, 1881, make the statute valid, as one laying an impost, or a duty on imports, for executing its inspection laws, under this provision of article 1, section 10, of the constitution of the United States: "No state shall, without the consent of congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress."

The act of May 28, 1881, is the only so-called inspection law of the state of New York cited as one with the execution of which the commissioners of emigration are charged by law. The money received from the \$1 tax for each alien passenger arriving for the first time is to be expended, as far as necessary, in executing the act of May 28th. The question arises, therefore, whether the act of May 28th is an inspection law within the meaning of article 1, section 10. Inspection laws were known when the constitution was framed in 1787, and what were inspection laws was well understood. They had reference solely to merchandise. Their object was to improve the quality of articles, and fit them for exportation or domestic use. *Gibbons v. Ogden*, 9 Wheat., 1, 203 (§§ 1183-1201, *supra*); 1 Kent, Comm., 439; Story, Const., § 1017.

In No. 44 of the Federalist, article 1, section 10, of the constitution is commented on, and it is said that the manner in which the restraint or the power of the states over imports and exports is there qualified — that is, in regard to inspection laws — "seems well calculated at once to secure to the states a reasonable discretion in providing for the convenience of their imports and exports, and to the United States a reasonable check against the abuse of their discretion." In Burrill's Law Dictionary "Inspection" is defined thus: "Official view or examination of commodities or manufactures, to ascertain their quality, under some statute requiring it." In Bouvier's Law Dictionary this is the definition: "The examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce." In *Clintman v. Northrop*, 8 Cow., 45, the inspection laws of New York are said to be laws "to protect the community, so far as they apply to domestic sales, from fraud and impositions, and in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets." By the constitution of New York of 1846, article 5, section 8, all offices for "inspecting any merchandise, produce, manufacture or commodity whatever," were abolished.

§ 1525. *"Imports" and "exports" refer only to merchandise.*

As the term "inspection laws," in the section under consideration, refers only to laws for inspecting articles of merchandise, this shows that the terms "imports" and "exports," in the same section, refer only to articles of merchandise. Persons are not imports or exports, or articles to be inspected,

under the section. To pass a statute directing persons to be inspected to ascertain their condition as to character or pecuniary means, or physical characteristics, and then another statute calling the first one an inspection law, does not make it an inspection law. It was not and is not and can never be an inspection law, in the sense of the constitution. Nor can passengers arriving in the United States be imports or exports, in the sense of the constitution. In *Brown v. State of Maryland*, 12 Wheat., 419, 437 (§§ 1466-70, *supra*), the section referred to was under consideration, and it was said by the court:

"What, then, is the meaning of the words 'imposts, or duties on imports or exports?' An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What then, are 'imports?' The lexicons inform us they are 'things imported.' If we appeal to usage for the meaning of the word we shall receive the same answer. They are the articles themselves which are brought into the country. 'A duty on imports,' then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence, which limit the prohibition, show the extent in which it was understood. The limitation is, 'except what may be absolutely necessary for executing its inspection laws.' Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition."

These observations are persuasive to show that persons are not imports or exports, or the subjects of inspection laws, within section 10 of article 1. The word "imports" and the word "exports" must have equal extent and scope. The former can have no greater than the latter. The suggestion that persons departing from the United States by vessel could properly be said to be exported, or to be exports, under any circumstances, even when retransported by public authority, is not one which commends itself to the general understanding. If not exports they cannot be imports. The fact that the importation of persons is referred to in section 9 of article 1 has no effect to include persons within the word "imports," where that word is used. The clause referred to prevents congress from prohibiting, prior to 1808, "the migration or importation of such persons" as any of the states then existing should think proper to admit. So far as this section referred to the involuntary arrival of persons, it had reference to persons brought in to become slaves and articles of merchandise.

There is nothing authoritative in the *Passenger Cases*, 7 How., 283 (§§ 1284-

1335, *supra*), or in any other decision of the supreme court, which conflicts with the foregoing views. The new statute of New York being void under the decision in the Henderson Case, no authority upholding it as a law laying a duty on imports to execute an inspection law can be derived from section 10 of article 1. In *Railroad Co. v. Husen*, 95 U. S., 465, 472 (§§ 1062-65, *supra*), the principle of the Henderson Case was affirmed and applied as a principle which forbids a state from burdening foreign commerce under the cover of exercising its police powers. It is such a burden to tax *all* alien passengers arriving by vessel for the first time, and the fact of examining or inspecting the persons of such passengers to see if they are good or bad, poor or rich, sane or lunatic, diseased or well, does not make the tax a tax to execute an inspection law.

Under this guise any law which required examination of any person or thing, and which used the word "inspection," could thereby be made an inspection law, and the restraint of the constitution could be frittered away, so long as the duties laid did not exceed what was necessary to execute the particular law. But there is, moreover, on the face of the act of May 28th, sufficient evidence that it cannot be regarded as an inspection law. The acts of May 28th and May 31st cannot either of them derive any greater force from the fact that they are two acts, than the enactments in the two would have if they were all in one and the same act. The act of May 28th goes beyond the inspection and the ascertainment of the facts prescribed, and authorizes the commissioners to take the objectionable persons into their care or custody, and provide for the transportation and support of such persons "so long as they may be a necessary public charge." Some of the objectionable persons are defined to be "infirm or orphan persons, without means or capacity to support themselves, and subject to become a public charge." This is an eleemosynary system for supporting paupers, it may be for their lives. Able-bodied aliens arriving here for the first time, with means, in health, not among the classes called "objectionable" in the act, are to have a tax of \$1 laid for each of them to support such system. This is not an inspection law. It is a direct interference with the exclusive power of congress to regulate commerce with foreign nations.

It is urged for the plaintiffs that, inasmuch as section 10 of article 1 declares that the state inspection law shall be subject to the revision and control of congress, this court has no jurisdiction to revise or control the action of the state in exacting or administering the law. If the law is an inspection law, it is as such subject to the revision and control of congress. But this fact cannot deprive the court of its power of adjudging, in a proper suit, whether the law is an inspection law at all, or whether it is a law of another character.

It results from the foregoing considerations that the demurrer is sustained, and judgment is ordered for the defendant, with costs.

§ 1526. **Imports are foreign goods.**—The word "imports," as used in subdivision 2 of section 10 of article I of the constitution, does not apply to goods brought from one state into another, but is limited to goods brought into the United States from foreign countries. *In re Rudolph*,\* 6 Saw., 295; *Hinson v. Lott*,\* 8 Wall., 148. See § 1452.

§ 1527. **Tax on receipts of railroads.**—A state tax on the gross receipts of railroad companies is not an impost or duty on imports or exports. *State Tax on Railway Gross Receipts*, 15 Wall., 284 (§§ 1263-64).

§ 1528. **Tax on passengers.**—A tax on each passenger carried out of the state is not a tax on exports. *Crandall v. State of Nevada*, 6 Wall., 35 (§§ 1269-73). See §§ 1087, 1111, 1119, 1249.

§ 1529. **Exporting dead bodies.**—An act of the California legislature, providing that no body shall be exhumed except on permit, to be had at the cost of \$10, and under which a China-

man was refused the right of exhumation of a corpse for transportation to China, except upon those terms, does not violate that section of the constitution which forbids any state to levy imposts on exports. Further, this provision relates to property, and a corpse is not property within its meaning. *In re Wong Yung Quy*,\* 6 Saw., 442.

§ 1530. *Stamps on tobacco.*—The clause in the constitution forbidding congress to levy any tax upon exports does not extend to the act of July 20, 1863, requiring tobacco to have a stamp placed on it when intended for exportation, so that the revenue officers may know what tobacco should pay the tax upon that staple and what is exempted therefrom; the real object being to protect the exports from such taxation and the government from fraud, and the amount paid for the stamp being for the expense of this precaution. Such stamp is not a tax on exports. *Pace v. Burgess*,\* 2 Otto, 872.

§ 1531. *Discrimination.*—A statute of Alabama levied a tax of fifty cents a gallon on all liquors brought from other states, but a similar tax was also collected on domestic liquors. *Held*, that as there was no discrimination in favor of the domestic product, the statute was valid; but if, on the contrary, the tax had been levied only on the products of other states, it would have been repugnant to the commercial clause of the constitution. *Hinson v. Lott*,\* 8 Wall., 148. See § 1456.

### 3. *Portwardens' Fees. Pilots.*

SUMMARY — *Fees of master and wardens of port; duty on tonnage*, § 1532.—*Regulating survey of hatches and damaged goods*, § 1533.—*State laws regulating pilotage*, § 1534.

§ 1532. A state statute provided that the master and wardens of a certain port should be entitled to demand and receive the sum of \$5, in addition to other fees, on every vessel entering the port, whether called upon to perform any duty or not. *Held*, that the statute was void, because it amounted to a regulation of commerce, and imposed a duty on tonnage. *Steamship Co. v. Portwardens*, §§ 1533-39. See § 1100.

§ 1533. A law of Louisiana, making it unlawful for any other person than the master and wardens of the port to make any survey of the hatches of sea-going vessels coming into port, or to make any survey of damaged goods coming on board of such vessels, or to give certificates on orders for sale of such damaged goods at auction, is unconstitutional. *Foster v. Master, etc., of Port of New Orleans*, §§ 1539-40.

§ 1534. State laws regulating pilots and pilotage are not in conflict with the provisions of the constitution prohibiting the states from laying duties on tonnage, or on imports or exports, or with the clause vesting in congress the power to regulate commerce. A law which requires half pilotage fees of vessels refusing to receive a pilot, and appropriating the money to the use of decayed pilots, etc., is valid. *Cooley v. Board of Wardens*, §§ 1541-47. See § 1100.

### STEAMSHIP COMPANY v. PORTWARDENS.

(6 Wallace, 31-35. 1867.

ERROR to the Supreme Court of Louisiana.

STATEMENT OF FACTS.—The statute involved in this case provided that the master and wardens of the port of New Orleans should be entitled to demand and receive, for every vessel entering the port, in addition to other fees, the sum of \$5, whether called upon to perform any service or not.

§ 1535. *Power of congress to regulate commerce.*

Opinion by CHASE, C. J.

That the power to regulate commerce with foreign nations and among the states is vested in congress, and that no state, without the consent of congress, can lay any duties or imposts on imports or exports, except what may be absolutely necessary for executing its inspection laws, or any duty of tonnage, are familiar provisions of the constitution, which have been frequently and thoroughly examined in former judgments of this court.

The power to regulate commerce was given to congress in comprehensive terms, and with the single exception of the power to lay duties on exports.

And it was thus given, so far as it relates to commerce between the states, with the obvious intent to place that commerce beyond interruption or embarrassment arising from the conflicting or hostile state regulations.

§ 1536. — *power of the states.*

At the same time, it was not intended to interfere with the exercise of state authority upon subjects properly within state jurisdiction. The power to enact inspection laws is expressly recognized as not affected by the grant of power to regulate commerce. And some other powers, the exercise of which may, in various degrees, affect commerce, have always been held not to be within the grant to congress. To this class it is settled belong quarantine and other health laws, laws concerning the domestic police, and laws regulating the internal trade of a state. There are other cases in which, either by express provision or by omission to exercise its own powers, congress has left to the regulation of states matters clearly within its commercial powers. Of this description were the pilot laws recognized as valid by the act of 1789 (1 Stat. at Large, 54) and 1837 (5 id., 153).

§ 1537. *A tax upon ships entering a port, to pay portwardens, is unconstitutional.*

That the act of the legislature of Louisiana is a regulation of commerce can hardly be doubted. It imposes a tax upon every ship entering the port of New Orleans, to be collected upon every entry. In the case of a steamer plying between that port and ports in adjoining states of Alabama or Texas, it becomes a serious burden, and works the very mischief against which the constitution intended to protect commerce among the states.

It is claimed, however, that the tax is for compensation to the master and wardens, whose duty it is to perform, when called upon, the various services required of portwardens, and that the law for its collection stands, therefore, on the same constitutional grounds as the state laws authorizing the collection of pilotage. But there are two answers to this proposition. The first is, that no act of congress recognizes such laws as that of Louisiana as proper and beneficial regulations, while the state laws in respect to pilotage are thus recognized. The second is, that the right to recover pilotage and half pilotage, as prescribed by state legislation, rests not only on state laws but upon contract. Pilotage is compensation for services performed; half pilotage is compensation for services which the pilot has put himself in readiness to perform by labor, risk and cost, and which he has actually offered to perform. *Steamship Co. v. Joliffe*, 2 Wall., 450. But in the case before us there were no services, and no offer to perform any. The state law is express. It subjects the vessel to the demand of the master and wardens, "whether they be called on to perform any service or not."

It may be true that the existence of such a body of men is beneficial to commerce, but the same is true of the government of the state, of the city government, of the courts, of the whole body of public functionaries. If the constitutionality of the charge for the benefit of the master and wardens can be maintained upon the ground that it secures compensation for services, it is difficult to perceive upon what grounds the constitutionality of any state law imposing taxes for the benefit of the state government, upon vessels landing in its ports, can be questioned. We think it quite clear, therefore, that the regulation of commerce made by the act before us comes within none of the limitations or exceptions to the general rule of the constitution that the regulation of commerce among the states is in congress.

§ 1538. *A duty on a ship is within the constitutional prohibition against states imposing duties on tonnage.*

We think, also, that the tax imposed by the act of Louisiana is, in the fair sense of the word, a duty on tonnage. In the most obvious and general sense, it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition upon the states against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty of tonnage. It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty.

In this view of the case the levy of the tax in question is expressly prohibited. On the whole we are clearly of opinion that the act of the legislature of Louisiana is repugnant to the constitution, and that the judgment of the supreme court of the state must therefore be reversed.

FOSTER v. MASTER AND WARDENS OF THE PORT OF NEW ORLEANS.

(4 Otto, 248-248. 1876.)

ERROR to the Supreme Court of Louisiana.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This controversy has arisen out of an act of the legislature of Louisiana, approved March 6, 1869. By the first section it was made the duty of the master and wardens of the port of New Orleans to offer their services to make a survey of the hatches of all sea-going vessels which should arrive at that port, and a penalty was prescribed for the neglect of this duty. The second section declares "that it shall be unlawful for any person other than the said master and wardens, or their legally constituted deputy, to make any survey of the hatches of sea-going vessels coming to said port of New Orleans, or to make any survey of damaged goods coming on board of such vessels, whether such survey be made on board or on shore, or to give certificates on orders for sale of such damaged goods at auction, or to do any other of the acts and things prescribed by law for said master and wardens to do and perform; and the person doing such illegal and forbidden acts, his instigators and encouragers, shall be liable and bound to pay *in solido* to the said master and wardens \$100, with damages and costs, for each of said illegal and forbidden acts so done."

The petition avers that Foster resides in the city of New Orleans, and has been and is continually violating the provisions of the act by making surveys of the hatches of sea-going vessels arriving at that port, and of damaged goods, and has been and is engaged in acting as, and performing the duties which belonged to, the master and wardens of the port.

An injunction was prayed for. It was granted by the lower court, and the judgment was affirmed by the supreme court of the state. A writ of error was thereupon sued out by Foster, and the case is thus brought before this court for review. The defendants in error have failed to enter their appearance, and no brief in their behalf has been submitted. We shall, therefore, devote but few remarks to the case.

§ 1539. *The Louisiana act of March 6, 1869, providing for the survey, by the master and wardens of the port of New Orleans, of the hatches of sea-going vessels at that port, is a regulation of commerce.*

The constitution of the United States, article 1, section 8, gives to congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." That the provisions of this act are regulations of both foreign and interstate commerce is a proposition which requires no argument to support it. They are a clog and a blow to all such commerce in the port to which they relate. Their enactment involved a power which belongs exclusively to congress, and which a state could not, therefore, properly exercise. In *Steamship Co. v. Portwardens*, 6 Wall., 31 (§§ 1535-38, *supra*), it was held that a statute of a state enacting that the master and wardens of a port within it should be entitled to demand and receive, in addition to other fees, the sum of \$5, whether called on to perform service or not, for every vessel arriving in that port, was a regulation of commerce, and was unconstitutional and void. If the constitutional objection was well taken there, *a multo fortiori* is it fatal here. The act is not, in the sense of the constitution, an inspection law. The object of such laws is to certify the quantity and value of the articles inspected, whether imports or exports, for the protection of buyers and consumers. *Gibbons v. Ogden*, 9 Wheat., 203 (§§ 1183-1201, *supra*); *Brown v. State of Maryland*, 12 id., 419 (§§ 1466-70, *supra*); *Clintsman v. Northrup*, 8 Cow., 46; *Bouv. Law Dict.*, "Inspection;" *Story's Const.*, secs. 1017, 1024; *Neilson v. Garza*, 2 Woods, 290 (§§ 1519-22, *supra*). The purpose of this act is to furnish official evidence for the parties immediately concerned, and, where the goods are damaged, to provide for and regulate their sale. *Master and Wardens v. Ship Hawes*, 6 La. Ann., 390.

Besides the unreason and the oppressive character of the act as regards ship-owners and consignees, it is an invasion of the rights of persons outside of these classes. If such a monopoly, sustained by such sanctions, may be validly given to the master and wardens, why may they not also, at prices not agreed upon by the parties, nor according to the market value, but at rates arbitrarily fixed by law, be authorized exclusively to load and unload ships, to furnish them with all needful supplies, and to perform all the services of consignees, commission merchants and ship-brokers, touching incoming and outgoing cargoes? Each of these imagined cases is a parallelism to the case before us, and only another step in the same direction. We hold the statute to be void.

§ 1540. *Power of the states to establish health regulations acknowledged.*

In expressing these views, we have no purpose to impugn anything heretofore said by this court as to the power of the states to establish inspection, quarantine, health and other regulations, within the sphere of their acknowledged authority. The constitutional validity of such regulations is as clear as the power of congress to establish regulations of commerce. It is no objection to the former that both operate upon the same subject. *Gilman v. Philadelphia*, 3 Wall., 713 (§§ 1164-70, *supra*); *Ex parte McNiel*, 13 id., 236. Judgment reversed, and the cause remanded with directions to dismiss the petition.

COOLEY v. BOARD OF WARDENS OF PORT OF PHILADELPHIA.

(12 Howard, 299-326. 1851.)

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—These cases are brought here by writs of error to the supreme court of the commonwealth of Pennsylvania.

They are actions to recover half-pilotage fees under the twenty-ninth section of the act of the legislature of Pennsylvania, passed on the 2d day of March, 1803. The plaintiff in error alleges that the highest court of the state has decided against a right claimed by him under the constitution of the United States. That right is, to be exempted from the payment of the sums of money, demanded pursuant to the state law above referred to; because that law contravenes several provisions of the constitution of the United States. The particular section of the state law drawn in question is as follows:

“That every ship or vessel arriving from, or bound to, any foreign port or place, and every ship or vessel of the burden of seventy-five tons or more, sailing from, or bound to, any port not within the river Delaware, shall be obliged to receive a pilot. And it shall be the duty of the master of every such ship or vessel, within thirty-six hours next after the arrival of such ship or vessel at the city of Philadelphia, to make report to the master-warden of the name of such ship or vessel, her draught of water and the name of the pilot who shall have conducted her to the port. And when any such vessel shall be outward bound, the master of such vessel shall make known to the wardens the name of such vessel, and of the pilot who is to conduct her to the capes, and her draught of water at that time. And it shall be the duty of the wardens to enter every such vessel in a book to be by them kept for that purpose, without fee or reward. And if the master of any ship or vessel shall neglect to make such report, he shall forfeit and pay the sum of \$60. And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner or consignee of such vessel shall forfeit and pay to the warden aforesaid a sum equal to the half-pilotage of such ship or vessel, to the use of the Society for the Relief, etc., to be recovered as pilotage in the manner hereinafter directed: Provided, always, that where it shall appear to the warden that, in case of an inward bound vessel, a pilot did not offer before she had reached Reedy Island; or, in case of an outward bound vessel, that a pilot could not be obtained for twenty-four hours after such vessel was ready to depart, the penalty aforesaid, for not having a pilot, shall not be incurred.” This is one section of “An act to establish a board of wardens for the port of Philadelphia, and for the regulation of pilots and pilotages,” etc., and the scope of the act is in conformity with the title, to regulate the whole subject of the pilotage of that port.

§ 1541. *The objects and beneficial effects of pilotage laws stated.*

We think this particular regulation concerning half-pilotage fees is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial states and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error, and their fitness, as part of a system of pilotage, in many places, may be inferred from their existence in so many different states and countries. Like other laws, they are framed to meet the most usual cases, *quæ frequentius accidunt*; they rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them; upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places; and upon the expediency, and even intrinsic justice, of not suffering those who have incurred labor, and expense, and danger, to place themselves in a position to render important service gener-



ally necessary, to go unrewarded, because the master of a particular vessel either rashly refuses their proffered assistance, or, contrary to the general experience, does not need it. There are many cases in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial states and countries have made an offer of pilotage service one of those cases; and we cannot pronounce a law which does this, to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage, as to be deemed, for this cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one.

It is urged that the second section of the act of the legislature of Pennsylvania, of the 11th of June, 1832, proves that the state had other objects in view than the regulation of pilotage. That section is as follows: "And be it further enacted, by the authority aforesaid, that from and after the 1st day of July next, no health-fee or half-pilotage shall be charged on any vessel engaged in the Pennsylvania coal trade."

It must be remembered that the fair objects of a law imposing half-pilotage when a pilot is not received may be secured, and at the same time some classes of vessels exempted from such charge. Thus, the very section of the act of 1803, now under consideration, does not apply to coasting vessels of less burden than seventy-five tons, nor to those bound to, or sailing from, a port in the river Delaware. The purpose of the law being to cause masters of such vessels as generally need a pilot, to employ one, and to secure to the pilots a fair remuneration for cruising in search of vessels, or waiting for employment in port, there is an obvious propriety in having reference to the number, size and nature of employment of vessels frequenting the port; and it will be found, by an examination of the different systems of these regulations, which have from time to time been made in this and other countries, that the legislative discretion has been constantly exercised in making discriminations, founded on differences both in the character of the trade and the tonnage of vessels engaged therein. We do not perceive anything in the nature or extent of this particular discrimination in favor of vessels engaged in the coal trade, which would enable us to declare it to be other than a fair exercise of legislative discretion, acting upon the subject of the regulation of the pilotage of this port of Philadelphia, with a view to operate upon the masters of those vessels, who, as a general rule, ought to take a pilot, and with the further view of relieving, from the charge of half-pilotage, such vessels as from their size, or the nature of their employment, should be exempted from contributing to the support of pilots, except so far as they actually receive their services. In our judgment, though this law of 1832 has undoubtedly modified the twenty-ninth section of the act of 1803, and both are to be taken together as giving the rule on this subject of half-pilotage, yet this change in the rule has not changed the nature of the law, nor deprived it of the character and attributes of a law for the regulation of pilotage.

Nor do we consider that the appropriation of the sums received under this section of the act, to the use of the Society for the Relief of Distressed and Decayed Pilots, their widows and children, has any legitimate tendency to impress on it the character of a revenue law. Whether these sums shall go directly to the use of the individual pilots by whom the service is tendered, or shall form a common fund, to be administered by trustees for the benefit of such pilots and their families as may stand in peculiar need of it, is a matter resting in

legislative discretion, in the proper exercise of which the pilots alone are interested.

§ 1542. *A state law imposing a half-pilotage is not in conflict with the clauses of the constitution prohibiting states from laying imposts, etc.*

For these reasons we cannot yield our assent to the argument that this provision of law is in conflict with the second and third clauses of the tenth section of the first article of the constitution, which prohibit a state, without the assent of congress, from laying any imposts or duties on imports or exports or tonnage. This provision of the constitution was intended to operate upon subjects actually existing and well understood when the constitution was formed. Imposts and duties on imports, exports and tonnage were then known to the commerce of the civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial states enforced their pilot laws, as they were from charges for wharfage or towage, or any other local post-charges for services rendered to vessels or cargoes; and to declare that such pilot fees or penalties are embraced within the words imposts or duties on imports, exports or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language. It cannot be denied that a tonnage duty, or an impost on imports or exports, may be levied under the name of pilot dues or penalties; and certainly it is the thing, and not the name, which is to be considered. But having previously stated that, in this instance, the law complained of does not pass the appropriate line which limits laws for the regulation of pilots and pilotage, the suggestion, that this law levies a duty on tonnage or on imports or exports, is not admissible; and, if so, it also follows that this law is not repugnant to the first clause of the eighth section of the first article of the constitution, which declares that all duties, imposts and excises shall be uniform throughout the United States; for, if it is not to be deemed a law levying a duty, impost or excise, the want of uniformity throughout the United States is not objectionable. Indeed, the necessity of conforming regulations of pilotage to the local peculiarities of each port, and the consequent impossibility of having its charges uniform throughout the United States, would be sufficient of itself to prove that they could not have been intended to be embraced within this clause of the constitution; for it cannot be supposed uniformity was required, when it must have been known to be impracticable.

§ 1543. — *and does not amount to a preference of the ports of one state over those of another.*

It is further objected that this law is repugnant to the fifth clause of the ninth section of the first article of the constitution, namely: "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels to or from one state be obliged to enter, clear or pay duties in another."

But as already stated, pilotage fees are not duties within the meaning of the constitution; and, certainly, Pennsylvania does not give a preference to the port of Philadelphia, by requiring the masters, owners or consignees of vessels sailing to or from that port to pay the charges imposed by the twenty-ninth section of the act of 1803. It is an objection to, and not a ground of preference of, a port, that a charge of this kind must be borne by vessels entering it; and, accordingly, the interests of the port require, and generally produce, such alleviations of these charges as its growing commerce from time to time renders consistent with the general policy of the pilot laws. This state, by its act of

the 24th of March, 1851, has essentially modified the law of 1803, and further exempted many vessels from the charge now in question. Similar changes may be observed in the laws of New York, Massachusetts and other commercial states, and they undoubtedly spring from the conviction that burdens of this kind, instead of operating to give a preference to a port, tend to check its commerce, and that sound policy requires them to be lessened and removed as early as the necessities of the system will allow.

In addition to what has been said respecting each of these constitutional objections to this law, it may be observed that similar laws have existed and been practiced on in the states since the adoption of the federal constitution; that by the act of the 7th of August, 1789 (1 Stats. at Large, 54), congress declared that all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, etc.; and that this contemporaneous construction of the constitution, since acted on with such uniformity in a matter of much public interest and importance, is entitled to great weight in determining whether such a law is repugnant to the constitution, as levying a duty not uniform throughout the United States, or as giving a preference to the ports of one state over those of another, or as obliging vessels to or from one state to enter, clear or pay duties in another. *Stuart v. Laird*, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheat., 304; *Cohens v. Virginia*, 6 Wheat., 264; *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 621. The opinion of the court is, that the law now in question is not repugnant to either of the above-mentioned clauses of the constitution.

§ 1544. *State laws relating to pilots are not in conflict with the commerce clause of the constitution.*

It remains to consider the objection that it is repugnant to the third clause of the eighth section of the first article: "The congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes." That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several states, and between the ports of the United States and foreign countries, we are brought to the conclusion that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the constitution. The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first congress assembled under the constitution passed laws, requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. 1 Stats. at Large, 55, 131. These have been from time to time added to and changed, and we are not aware that their validity has been questioned.

Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage-ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons

engaged in navigation, but he occupies a most important and responsible place among those thus engaged. And if congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can perceive no valid reason why the pilot should be beyond the reach of the same power. It is true that, according to the usages of modern commerce on the ocean, the pilot is on board only during a part of the voyage between ports of different states, or between ports of the United States and foreign countries; but if he is on board for such a purpose and during so much of the voyage as to be engaged in navigation, the power to regulate navigation extends to him while thus engaged, as clearly as it would if he were to remain on board throughout the whole passage, from port to port. For it is a power which extends to every part of the voyage, and may regulate those who conduct or assist in conducting navigation in one part of a voyage as much as in another part, or during the whole voyage.

Nor should it be lost sight of, that this subject of the regulation of pilots and pilotage has an intimate connection with, and an important relation to, the general subject of commerce with foreign nations and among the several states, over which it was one main object of the constitution to create a national control. Conflicts between the laws of neighboring states, and discriminations favorable or adverse to commerce with particular foreign nations, might be created by state laws regulating pilotage, deeply affecting that equality of commercial rights, and that freedom from state interference, which those who formed the constitution were so anxious to secure, and which the experience of more than half a century has taught us to value so highly. The apprehension of this danger is not speculative merely. For, in 1837, congress actually interposed to relieve the commerce of the country from serious embarrassment, arising from the laws of different states, situate upon waters which are the boundary between them. This was done by an enactment of the 2d of March, 1837 (5 Stats. at Large, 153), in the following words: "Be it enacted, that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states bounded on the said waters, to pilot said vessel to or from said port, any law, usage or custom to the contrary notwithstanding."

The act of 1789 (1 Stats. at Large, 54), already referred to, contains a clear legislative exposition of the constitution by the first congress, to the effect that the power to regulate pilots was conferred on congress by the constitution; as does also the act of March the 2d, 1837, the terms of which have just been given. The weight to be allowed to this contemporaneous construction, and the practice of congress under it, has, in another connection, been adverted to. And a majority of the court are of opinion that a regulation of pilots is a regulation of commerce, within the grant to congress of the commercial power, contained in the third clause of the eighth section of the first article of the constitution. It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of congress of the 7th of August, 1789, section 4, is as follows: "That all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress."

If the law of Pennsylvania, now in question, had been in existence at the date of this act of congress, we might hold it to have been adopted by congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of congress to the then existing state laws on this subject, so long as they should continue unrepealed by the state which enacted them. But the law on which these actions are founded was not enacted till 1803. What effect, then, can be attributed to so much of the act of 1789 as declares that pilots shall continue to be regulated in conformity "with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress?" If the states were divested of the power to legislate on this subject by the grant of the commercial power to congress, it is plain this act could not confer upon them power thus to legislate. If the constitution excluded the states from making any law regulating commerce, certainly congress cannot regrant, or in any manner reconvey, to the states that power. And yet this act of 1789 gives its sanction only to laws enacted by the states. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a state, acting in its legislative capacity, can be deemed a law enacted by a state; and if the state has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the consideration of the question whether the grant of the commercial power to congress did *per se* deprive the states of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one come before this court.

§ 1545. *The states are not expressly excluded from exercising authority over the subject of commerce.*

The grant of commercial power to congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power thus granted to congress requires that a similar authority should not exist in the states. If it were conceded, on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to congress as effectually and perfectly excludes the states from all future legislation on the subject as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to congress did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations. *Sturges v. Crowninshield*, 4 Wheat., 193 (§§ 1937-39, *infra*); *Houston v. Moore*, 5 Wheat., 1 (§§ 161-190, *supra*); *Willson v. Blackbird Creek Marsh Co.*, 2 Pet., 251 (§§ 1174-76, *supra*).

The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by congress, it must be intended to refer to the subjects of that power, and to say, they are of such a nature as to require exclusive legislation by congress. Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various, subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, a plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first congress, that the nature of this subject is such, that, until congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated "by such laws as the states may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the states a power to legislate, of which the constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the states, and of the national government, has been in conformity with this declaration from the origin of the national government to this time, and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation drawn from local knowledge and experience and conformed to local wants. How, then, can we say that, by the mere grant of power to regulate commerce, the states are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of congress must be exclusive. This would be to affirm that the nature of the power is, in this case, something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by congress, while the nature of one of the subjects of that power, not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the states, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the

nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive, by affirming of the power what is not true of its subject now in question.

§ 1546. *The grant to congress of the power to regulate commerce did not deprive the states of the power to regulate pilots.*

It is the opinion of a majority of the court that the mere grant to congress of the power to regulate commerce did not deprive the states of power to regulate pilots, and that although congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of congress, or may be regulated by the states in the absence of all congressional legislation; nor to the general question, how far any regulation of a subject by congress may be deemed to operate as an exclusion of all legislation by the states upon the same subject. We decide the precise questions before us upon what we deem sound principles, applicable to this particular subject in the state in which the legislation of congress has left it. We go no further.

We have not adverted to the practical consequences of holding that the states possess no power to legislate for the regulation of pilots, though in our apprehension these would be of the most serious importance. For more than sixty years this subject has been acted on by the states, and the systems of some of them created, and of others essentially modified, during that period. To hold that pilotage fees and penalties demanded and received during that time have been illegally exacted, under color of void laws, would work an amount of mischief which a clear conviction of constitutional duty, if entertained, must force us to occasion, but which could be viewed by no just mind without deep regret. Nor would the mischief be limited to the past. If congress were now to pass a law adopting the existing state laws, if enacted without authority, and in violation of the constitution, it would seem to us to be a new and questionable mode of legislation.

If the grant of commercial power in the constitution has deprived the states of all power to legislate for the regulation of pilots, if their laws on this subject are mere usurpations upon the exclusive power of the general government, and utterly void, it may be doubted whether congress could, with propriety, recognize them as laws, and adopt them as its own acts; and how are the legislatures of the states to proceed in future, to watch over and amend these laws, as the progressive wants of a growing commerce will require, when the members of those legislatures are made aware that they cannot legislate on this subject without violating the oaths they have taken to support the constitution of the United States? We are of opinion that this state law was enacted by virtue of a power, residing in the state, to legislate; that it is not in conflict with any law of congress; that it does not interfere with any system which congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the supreme court of Pennsylvania in each case must be affirmed.

Dissenting opinion by MR. JUSTICE M'LEAN.

It is with regret that I feel myself obliged to dissent from the opinion of a majority of my brethren in this case. As expressing my views on the question

involved, I will copy a few sentences from the opinion of Chief Justice Marshall, in the opinion in *Gibbons v. Ogden* (9 Wheat., 1; §§ 1183-1201, *supra*). "It has been said," says that illustrious judge, "that the act of August 7, 1789, acknowledges a concurrent power in the states to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with congress to regulate commerce with foreign nations and amongst the states." But this inference is not, we think, justified by the fact.

"Although congress," he continues, "cannot enable a state to legislate, congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by congress. But the act, it may be said, is prospective also, and the adoption of laws to be in future presupposes the right in the maker to legislate on the subject.

"The act unquestionably manifests an intention to leave this subject entirely to the states, until congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by congress. But this section is confined to pilots within the bays, inlets, rivers, harbors and ports of the United States, which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; and the adoption of its system by congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the states so to apply it of their own authority. But the adoption of the state system being temporary, being only "until further legislative provision shall be made by congress," shows conclusively an opinion that congress could control the whole subject, and might adopt the system of the states or provide one of its own.

Why did congress pass the act of 1789, adopting the pilot laws of the respective states? Laws they unquestionably were, having been enacted by the states before the adoption of the constitution. But were they laws under the constitution? If they had been so considered by congress, they would not have been adopted by a special act. There is believed to be no instance in the legislation of congress, where a state law has been adopted, which, before its adoption, applied to federal powers. To suppose such a case would be an imputation of ignorance as to federal powers, least of all chargeable against the men who formed the constitution and who best understood it. Congress adopted the pilot laws of the states because it was well understood they could have had no force, as regulations of foreign commerce or of commerce among the states, if not so adopted. By their adoption they were made acts of congress, and ever since they have been so considered and enforced. Each state regulates the commerce within its limits, which is not within the range of federal powers. So far, and no further, could effect have been given to the pilot laws of the states, under the constitution. But those laws were only adopted "until further legislative provisions shall be made by congress." This shows that congress claimed the whole commercial power on this subject, by adopting the pilot laws of the states, making them acts of congress; and also by declaring that the adoption was only until some further legislative pro-



vision could be made by congress. Can congress annul the acts of a state passed within its admitted sovereignty? No one, I suppose, could sustain such a proposition. State sovereignty can neither be enlarged nor diminished by an act of congress. It is not known that congress has ever claimed such a power.

§ 1547. *The states have no inherent power to pass pilot laws.*

If the states had not the power to enact pilot laws, as connected with foreign commerce, in 1789, when did they get it? It is an exercise of sovereign power to legislate. In this respect the constitution is the same now as in 1789, and also the power of a state is the same. Whence, then, this enlargement of state power? Is it derived from the act of 1789, that pilots shall continue to be regulated "in conformity with such laws as the states may respectively hereafter enact?" In the opinion of the chief justice, above cited, it is said congress may adopt the laws of a state, but it cannot enable a state to legislate. In other words, it cannot transfer to a state legislative powers. And the court also say that the states cannot apply the pilot laws of their own authority. We have here, then, the deliberate action of congress, showing that the states have no inherent power to pass these laws, which is affirmed by the opinion of this court.

Ought not this to be considered as settling this question? What more of authority can be brought to bear upon it? But, it is said that congress is incompetent to legislate on this subject. Is this so? Did not congress, in 1789, legislate on the subject by adopting the state laws, and may it not do so again? Was not that a wise and politic act of legislation? This is admitted. But it is said that congress cannot legislate on this matter in detail. The act of 1789 shows that it is unnecessary for congress so to legislate. A single section covers the whole legislation of the states, in regard to pilots. Where, then, is the necessity of recognizing this power to exist in the states? There is no such necessity; and if there were, it would not make the act of the state constitutional; for it is admitted that the power is in congress.

That a state may regulate foreign commerce, or commerce among the states, is a doctrine which has been advanced by individual judges of this court; but never before, I believe, has such a power been sanctioned by the decision of this court. In this case, the power to regulate pilots is admitted to belong to the commercial power of congress; and yet it is held that a state, by virtue of its inherent power, may regulate the subject, until such regulation shall be annulled by congress. This is the principle established by this decision. Its language is guarded, in order to apply the decision only to the case before the court. But such restrictions can never operate so as to render the principle inapplicable to other cases. And it is in this light that the decision is chiefly to be regretted. The power is recognized in the state, because the subject is more appropriate for state than federal action; and, consequently, it must be presumed the constitution cannot have intended to inhibit state action. This is not a rule by which the constitution is to be construed. It can receive but little support from the discussions which took place on the adoption of the constitution, and none at all from the earlier decisions of this court.

It will be found that the principle in this case, if carried out, will deeply affect the commercial prosperity of the country. If a state has power to regulate foreign commerce, such regulation must be held valid until congress shall repeal or annul it. But the present case goes further than this. Congress regulated pilots by the act of 1789, which made the acts of the state, on that subject, the acts of congress. In 1803, Pennsylvania passed the law in ques-

tion, which materially modified the act adopted by congress; and this act of 1803 is held to be constitutional. This, then, asserts the right of a state, not only to regulate foreign commerce, but to modify, and, consequently, to repeal, a prior regulation of congress. Is there a mistake in this statement? There is none, if an adopted act of a state is thereby made an act of congress, and if the regulation of pilots, in regard to foreign commerce, be a regulation of commerce. The latter position is admitted in the opinion of the court, and no one will controvert the former. I speak of the principle of the opinion, and not of the restricted application given to it by the learned judge who delivered it. The noted Blackbird Creek Case, 2 Pet., 245, shows what little influence the facts and circumstances of a case can have in restraining the principle it is supposed to embody.

How can the unconstitutional acts of Louisiana, or of any other state which has ports on the Mississippi, or the Ohio, or on any of our other rivers, be corrected, without the action of congress? And when congress shall act, the state has only to change its ground, in order to enact and enforce its regulations. Louisiana now imposes a duty upon vessels for mooring in the river opposite the city of New Orleans, which is called a levee tax, and which, on some boats performing weekly trips to that city, amounts to from \$3,000 to \$4,000 annually. What is there to prevent the thirteen or fourteen states bordering upon the two rivers first named from regulating navigation on those rivers, although congress may have regulated the same at some prior period? I speak not of the effect of this doctrine theoretically in this matter, but practically. And if the doctrine be true, how can this court say that such regulations of commerce are invalid? If this doctrine be sound, the Passenger Cases were erroneously decided. In those cases there was no direct conflict between the acts of the states taxing passengers and the acts of congress.

From this race of legislation between congress and the states, and between the states, if this principle be maintained, will arise a conflict similar to that which existed before the adoption of the constitution. The states favorably situated, as Louisiana, may levy a contribution upon the commerce of other states, which shall be sufficient to meet the expenditures of the states. The application of the money exacted under this act of Pennsylvania, it is said, shows that it is not raised for revenue. The application of the money cannot be relied on as showing an act of a state to be constitutional. If the state has power to pass the act, it may apply the money raised in its discretion.

I think the charge of half pilotage is correct under the circumstances, and I only object to the power of the state to pass the law. Congress, to whom the subject peculiarly belongs, should have been applied to, and no doubt it would have adopted the act of the state.

MR. JUSTICE DANIEL concurred in the judgment of the court, on the ground that the power to pass pilot laws is an original and inherent power in the states. MR. JUSTICE WAYNE dissented.



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